Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1726

MRS. FRANCIS NELL HIGGINBOTHAM,
Administratrix, etc. of Marshall K. Higginbotham, Deceased, etc., et al.,

Petitioners

versus

MOBIL OIL CORPORATION, ET AL.,

Respondents

Petition For A Writ of Certiorari To The
United States Court of Appeals for the
Fifth Circuit

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IN THE
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NO.

MRS. FRANCIS NELL HIGGINBOTHAM,
Administratrix, etc. of Marshall K. Higginbotham,
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Petitioners

versus

MOBIL OIL CORPORATION, ET AL.,
Respondents

Petition for a Writ of Certiorari To The United States
Court of Appeals For The Fifth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on January 13, 1977, a rehearing of said case being denied by the United States Court of Appeals for the Fifth Circuit on March 7, 1977.

OPINION BELOW

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 USC Section 1651(A).

QUESTIONS PRESENTED

1. Was the award of future earnings made by the Trial Court, and subsequently reversed by the Fifth Circuit Court

of Appeal, proper under the circumstances of this case?

2. In computing damages for loss of future earnings recoverable on behalf of the survivors of a deceased wage earner, may the trier of fact use as a basis for its computations actual increases in salary received by the decedent's replacement?

3. Is a loss of future earnings attributable to the decreasing purchasing power of the dollar a recoverable item of damages?

4. In computing damages for loss of future earnings, may the trier of fact take into consideration the decreasing purchasing power of the dollar?

5. May the decreasing purchasing power of the dollar be used to offset the discount of future earnings to present value?

STATEMENT OF THE CASE

This is one of four consolidated cases arising from the crash of Bell Jet Ranger Helicopter N7846S on August 15, 1967, in the Gulf of Mexico, more than a marine league from the shore of Louisiana.

In this case, Mrs. Francis Nell Higginbotham, administratrix and personal representative of the estate of the deceased, Marshall K. Higginbotham, etc. versus Mobil Oil Corporation and Bell Helicopter Company, a subdivision of or a subsidiary of Bell Aerospace Corporation and/or Textron, Inc., the widow and minor daughter of the deceased guest passenger, Marshall K. Higginbotham, seek damages

for his death from Mobil Oil Corporation under the General Maritime Law, Death On The High Seas Act, and the Louisiana Wrongful Death Act, Louisiana Civil Code Article 2315; and from Bell Helicopter Company, the designer and manufacturer of the craft, under the Death On The High Seas Act, the General Maritime Law and the Louisiana Wrongful Death Act, Louisiana Civil Code Article 2315.

The District Court held Mobil liable for the death of Marshall K. Higginbotham under the Death On The High Seas Act, and the General Maritime Law. It exonerated Bell from any liability in this case. The District Court then proceeded to award damages to Mr. Higginbotham's survivors in the total sum of THREE HUNDRED SIXTY-TWO THOUSAND TWO HUNDRED NINETY-SEVEN AND NO/100 DOLLARS ($362,297.00). This sum included loss of future earnings in the total sum of TWO HUNDRED SIXTY-FOUR THOUSAND FOUR HUNDRED EIGHTY-SIX AND NO/100 DOLLARS ($264,486.00).

At the time of his death, Mr. Higginbotham was a senior tool pusher employed by Baxter Drilling Company, for whom he had worked continuously since June 11, 1963. Mr. Higginbotham was employed at a salary of $1,100.00 per month, plus numerous other items paid in the form of additional salary. Evidence elicited at the trial conclusively shows that had Mr. Higginbotham lived, he would have continued to enjoy increases in his earnings. As Baxter Drilling Company had no regular policy in regard to salary increases, [illegible] Herbert Hamilton, an imminent expert in the field of [illegible]nomics and statistics, used the salary of D.W. Case, the man who replaced Mr. Higginbotham after his death, to project a sensible rate of increase in future earnings. Using the actual salary increases received by D. W. Case, Dr. Hamilton computed an annual salary increase of

approximately five percent (5%). These figures were then discounted by five percent (5%) and this figure was further reduced by fifteen percent (15%), for personal consumption of the deceased. It was in this manner that the TWO HUNDRED SIXTY-FOUR THOUSAND FOUR HUNDRED EIGHTY-SIX AND NO/100 DOLLARS ($264,486.00) award for loss of future earnings was arrived at.

The cases consolidated for trial in the District Court were subsequently appealed to the United States Court of Appeals for the Fifth Circuit. On appeal, the Fifth Circuit affirmed the finding of liability by Mobil Oil Corporation and the exoneration of Bell. The court further reversed the award of future earnings to the survivors of Marshall K. Higginbotham on the grounds that the award contained a hidden inflation based projection. The Court of Appeal reversed this particular item despite the express statement of the District Court Judge that he did not consider inflation in making the award.

As a result of the reversal of the award to the survivors of Marshall K. Higginbotham, this Application for Writs of Certiorari to the United States Court of Appeal for the Fifth Circuit has been filed.

REASONS FOR GRANTING THE WRIT

I.

The writ of certiorari should be granted because there now exists among the various circuits of the United States Courts of Appeal a serious conflict as to whether the trier of fact may consider the decreasing purchasing power of the dollar in computing awards for the loss of future earnings. This question is of such significance that a definitive statement on the propriety of such awards is required in the interest of assuring uniformity of the law in the Federal Courts of the United States.

It has long been established that the personal representative of a decedent may recover the actual pecuniary loss occasioned by the death. This is the measure of damages under the Jones Act, the Death On The High Seas Act, and the General Maritime Law. 46 U.S.C.A. Section 688; 45 U.S.C.A. Section 51; 46 U.S.C.A. Sections 761 and 762; *Michigan Central Railway Company vs. Vreeland*, 33 S.Ct. 192, (1913); *Neal vs. Saga Shipping Company*, 407 F.2d 481 (5th Cir., 1969). Under all of the above cited statutes, the dependent survivors of a decedent are entitled to recover damages for the loss of contribution and support that they would have received out of the accrued and future gross earnings of the decedent had he lived. See *Moragne versus States Marine Lines, Inc.*, 90 S.Ct. 1772, (1970). In making a determination of the extent of loss of future earnings, a court should consider not only the decedent's actual earnings at the time of his death, but also his work habits and his prospects for future advancement. See *Petition of Risdal & Anderson, Inc.*, 291 F. Supp. 353 (D.C. Mass., 1968). It is further the law of the land that awards for future earnings must be reduced to present value using an appropriate discount rate. *Chesapeake & Ohio Railway vs. Kelly*, 36 S.Ct. 630, (1916).

In recent years, a great controversy has arisen over whether the courts, in determining the extent of future earnings loss, may also consider the effect of inflation or deflation on the award. Those courts which refuse to make an allowance for the decreasing purchasing power of the

dollar do so on the stated theory that it is too speculative to attempt an accurate projection of inflationary trends in the economy over a long range period of time. *Williams vs. United States*, 435 F.2d 804 (1st Cir. 1970); *Frankel vs. Heym*, 321 F.Supp. 1331 (E.D., Pa. 1970), affirmed at 466 F.2d 1226 (3rd Cir. 1972); *Johnson vs. Penrod Drilling Company*, 510 F.2d 234 (5th Cir., 1975). Other courts have held that while there may be some difficulty in showing exact projections of future inflation, the fact remains that inflation is an evil present in the economy of this country and failure to take it into consideration when computing future damages deprives a claimant of full compensation for his wage loss. *Bach vs. Penn Central Transportation Company*. 502 F.2d 1117 (6th Cir. 1974); *United States vs. English*, 521 F.2d 63 (9th Cir., 1975); *Riha vs. Jasper Blackburn Corporation*, 516 F.2d 840 (8th Cir., 1975).

A review of the pertinent decisions of the various United States Circuit Courts of Appeal will clearly show the confusion and conflict of decisions encountered by these courts in dealing with the question of the effect of inflation on awards for future earnings.

The First Circuit Court of Appeal does not permit evidence of inflation to be considered in computing damages for future earnings. This rule was set forth in *United States vs. Williams*, supra, and was reaffirmed in the recent case of *Caron vs. United States*, 410 F.Supp. 378 (D.C., R.I., 1976), wherein *Williams* was cited as controlling in that circuit.

In *McWeeney vs. New York, N.H. & H.R.R. Company*, 282 F.2d 34 (2nd Cir., 1960), the court stated that "There is little or no authority in favor of charging the jury to take

future inflation into account. . ." Though the major holding of the *McWeeney* decision was concerned with the effect of income taxes on an award of future earnings, this case has long been cited as setting forth the rule, in the Second Circuit, that inflation is not an item for consideration in computing future damages. More recently, the Second Circuit held in *Yodice vs. Koninklijke Nederlandsch Stoom. Maat.*, 443 F.2d 76 (2nd Cir., 1971), "If inflation should continue at its present pace, courts may have to reconsider the propriety of the long recognized charge with respect to discount." It is interesting to note that both opinions, *McWeeney* and *Yodice*, were authored by Judge Friendley. Thus, while it seems that the rule followed by the Second Circuit does not permit consideration of inflation, there well may be some softening of the court's position on this point. In 1975, the Second Circuit affirmed a District Court's application of a 1.5% discount of future earnings to offset the effect of inflation. *Feldman vs. Allegheny Airlines*, 524 F.2d 384 (2nd Cir., 1975). This was, however, a diversity case applying Michigan law.

The position taken by the Third Circuit Court of Appeal is clearly set forth in *Frankel vs. Heym*, supra, in which the court held that inflation projections are too speculative to be used as a factor in computing damages.

While the Fourth Circuit Court of Appeal apparently has not addressed itself to this particular point, there are holdings of the District Courts within the Fourth Circuit which do permit evidence of inflation to be presented to the trier of fact. In *Scruggs vs. Chesapeake & Ohio Railway Company*, 320 F.Supp. 1248 (W.D. Va., 1970), the court held that it was not improper to permit testimony on the future purchasing power of the dollar. In *Scruggs*, the court noted that there is no definitive pronouncement by

the Fourth Circuit on its particular rule then reviewed the various arguments concerning the use of inflation and chose to allow such evidence.

With the decision in *Johnson vs. Penrod*, supra, the Fifth Circuit clearly alligned itself with those jurisdictions which do not allow evidence of inflationary trends in computing future damages. However, in the subsequent case of *Menard vs. Penrod Drilling Company*, 538 F.2d 1084 (5th Cir., 1976), the Fifth Circuit allowed an award of damages including a wage increase factor to stand, without discussing the issue of inflation. In a concurring opinion, Judge Gee stated that an objection must be made to the introduction of evidence tending to show inflationary increases before such evidence will be disallowed. These decisions appear to create somewhat of a conflict within the Fifth Circuit as to when and under what circumstances awards of future damages which do reflect some degree of inflation are permissible. See also: *Davis v. Hill Engineering, Inc.*, 549 F. 2d 314 (5th Cir., 1977).

With the decision in *Sleeman vs. Chesapeake & Ohio Railroad*, 414 F.2d 305 (6th Cir., 1969), the Sixth Circuit apparently alligned itself with those courts which disallowed evidence of inflationary trends. However, a turnabout in this position was evidenced in the Sixth Circuit's recent holding in *Bach vs. Penn Central*, supra. In *Bach*, an FELA case, the court held that the Trial Court committed error in charging the jury that it should not consider "future increases or decreases in the purchasing power of money". The court further stated:

> ". . .if a jury is not permitted to consider decreases in the purchasing power of money, appellant would be woefully damaged if inflation should continue at its present or at any other substantial rate."

> ". . .if jurors should be prohibited from applying their common knowledge of inflation in reaching a verdict, the party entitled to recover could be greviously under compensated."

The holding in *Bach* puts the Sixth Circuit in the forefront of those courts which allow compensation for the effect of inflation.

No decisions from the Seventh Circuit in regard to the point in question have been found.

In *Riha vs. Jasper Blackburn Corporation*, supra, and *Johnson vs. Serra*, 521 F.2d 1289 (8th Cir., 1975), the Eighth Circuit declared itself to be in line with the holding in *Bach vs. Penn Central.*

In *United States vs. English*, supra, the Ninth Circuit, again following the *Bach* holding, announced itself in conformity with those jurisdictions which hold that the trier of fact may take into account future estimates of changes in the purchasing power of money in arriving at a damage award. This conclusion by the Ninth Circuit had been previously hinted at in *Mills vs. Tucker*, 499 F.2d 866 (9th Cir., 1974), wherein the court, in a Per Curiam decision, stated that the Trial Court may not have been entirely correct in failing to take inflation into consideration in its computation of the damage award.

The Tenth Circuit, like the Fourth Circuit, has yet to pronounce a definitive position on the question. However

at least one District Court has considered the issue and rejected the use of inflation in computing damages as too speculative. *Deweese vs. United States*, 419 F.Supp. 170 (D.C., Col., 1976)

As can be seen from this rather lengthy review of the various circuits, there is a considerable diversity of opinion on the question of the effect of inflation on damage awards.

II.

The writs should be granted because the decision of the District Court Judge in regard to the amount of damages allowable to the survivors of Marshall K. Higginbotham was correct. The Court of Appeals committed reversible error in finding that the District Court Judges rulings in regard to the amount awarded was clearly erroneous.

Petitioner submits that the findings of fact made by the judge in the District Court were correct, and not clearly erroneous. Therefore, under Federal Rule of Civil Procedure 52(a), the Fifth Circuit Court of Appeal was without authority to reverse the Trial Court's findings in regard to the lost wages of Marshall K. Higginbotham.

At the trial of the case, the judge of the District Court was presented with concrete evidence of Marshall K. Higginbotham's probable increases in salary. The undisputed evidence showed that such increases would be forthcoming. Additionally, expert testimony provided by Dr. Herbert Hamilton was based, not on speculation, but upon the actual increased earnings received by the man who replaced Marshall K. Higginbotham following his death. As Baxter Drilling Company had no stated policy of wage increases,

review of the replacement's salary increases provides the most accurate and revealing evidence of Marshall K. Higginbotham's probable salary increases.

Further, in making the award for lost wages the Trial Court stated "In determining the amount of the awards for loss of future earnings, we did not take into consideration the decreasing purchasing power of the dollar. Although there are some cases which hold that it is proper to include in this computation cost of living increases, we feel that such an additional award would have to await the final outcome of the Fifth Circuit Court of Appeals en banc rehearing of *Johnson vs. Penrod Drilling Company*, 475 F.2d 1404." It is clear from the Trial Court's reasons for ruling that he did not take inflation into consideration. The effect of the Fifth Circuit's reversal, in view of the Trial Judge's pronouncement, merely results in the Fifth Circuit substituting its judgment for that of the Trial Judge. It is submitted that this is improper appellate review by the Fifth Circuit and necessitates a reversal of the appellate tribunal's decision on this point.

CONCLUSION

In summary, petitioners urge that due to the importance of the issue presented herein and the current conflict among the courts as to its proper resolution, and further in view of the error committed by the Fifth Circuit Court of Appeal upon its review of the District Court's holding, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

THOMPSON & SELLERS

BY: _____

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(318) 893-3107

Counsel for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the above and foregoing has this date been forwarded to Mr. Carl J. Schumacher, Jr., Attorney for Defendant, Mobil Oil Corporation, 1106 Arabella Street, New Orleans, Louisiana 70115, and Mr. A. R. Christovich, Christovich & Kearney, 1815 American Bank Building, New Orleans, Louisiana by placing same in the United States mail postage prepaid and properly addressed.

Abbeville, Louisiana this 3rd day of June, 1977.

_____

Charles M. Thompson, Jr.

APPENDIX A

QUANTUM

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA
OPELOUSAS DIVISION

Civil Action No. 13,954

MRS. FRANCIS NELL HIGGINBOTHAM ADMX. ETC.
OF MARSHALL K. HIGGINBOTHAM, DECEASED, ETC.

versus

MOBIL OIL CORPORATION, ET AL.

* * * * *

CIVIL ACTION NO. 13,958

MRS. WANDA MOORE LONG, ADMX. OF EST. OF
DECEASED JOSEPH C. LONG, JR., ETC.

versus

BELL HELICOPTER CO., ETC. ET AL.

* * * * *

CIVIL ACTION NO. 15,316

JEANETTE LEBLANC NATION, PERSONAL REPRESENTATIVE FOR ELLA MENARD NATION AND ROY GLEN NATION

versus

TEXTRON INDUSTRIES, INC., ETC. ET AL.

* * * * *

CIVIL ACTION NO. 15,326

MRS. ARLINE J. SHINN, IND., ETC.

versus

MOBIL OIL CORPORATION

* * * * *

(Consolidated Cases)

FOR PLAINTIFFS:	MESSRS.
Mrs. Nell Higginbotham Mrs. Jeanette LeBlanc Nations	Charles M. Thompson, Jr. 112 S. Louisiana Avenue Abbeville, Louisiana 70510
Mrs. Wanda Moore Long	Jack C. Caldwell Aycock, Horne, Caldwell & Coleman 519 Main Street Franklin, Louisiana 70538

Mrs. Arline J. Shinn	Jack C. Benjamin Kierr & Gainsburgh Suite 1718 National Bank of Commerce Building New Orleans, Louisiana 70112

FOR THIRD PARTY PLAINTIFF:

Mobil Oil Corporation	Carl J. Schumacher and Robert Badger Lemle, Kelleher, Kohlmeyer, Mathews & Schumacher 1800 National Bank of Commerce Bldg. New Orleans, Louisiana 70112

FOR DEFENDANTS:

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NAUMAN S. SCOTT, JUDGE

QUANTUM

FINDINGS OF FACT

MARSHALL K. HIGGINBOTHAM

1. As per Letters Testamentary issued by the Fifteenth Judicial District Court for the Parish of Vermilion in the proceedings entitled "Succession of Marshall K. Higginbotham" bearing docket Number 5751, dated April 17, 1968, and the Tutorship of Donna Joyce Higginbotham, plaintiff, Mrs. Francis Nell Higginbotham, is the duly qualified testamentary executrix of the Succession of Marshall K. Higginbotham, the personal representative of his estate, and the duly qualified tutrix of Donna Joyce Higginbotham.

2. At the time of the accident, Marshall K. Higginbotham had been married to Francis Nell Higginbotham since June 24, 1950, and had lived with her until his death.

3. Marshall K. Higginbotham was born February 15, 1925, and at the time of death was 42 years of age and had a reasonable life expectancy of 29.45 years. Mrs. Higginbotham was born September 12, 1930, and according to life tables in evidence, had a reasonable life expectancy in excess of that of her husband. One child had been adopted by Mr. and Mrs. Higginbotham on September 21, 1962, but had lived with Mr. and Mrs. Higginbotham since she was six weeks old. This child, Donna Joyce Higginbotham, was nine years of age at the time of her father's death on August 15, 1967.

4. At the time of the casualty, decedent, his wife and Donna resided together in Vermilion Parish, Louisiana.

5. Mrs. Higginbotham and Donna were dependent upon decedent for their support and subsistence.

6. Although the evidence does not indicate the length of time which elapsed while the ill-fated helicopter was crashing, we find that the resultant crash was for all practical purposes instantaneous, thus precluding any award for conscious pain, suffering and mental anguish.

7. At the time of his death, Higginbotham was a senior tool pusher employed by Baxter Drilling Company, for whom he had worked continuously since June 11, 1963. Mr. Higginbotham was employed at a salary of $1100.00 per month, plus numerous other items paid in the form of additional salary. Baxter, a corporation of much smaller size than Mobil or Bell, for example, furnished an automobile to decedent, with all expenses included for operation, use, repairs and insurance on the automobile and for his full use. Dr. Herbert Hamilton, an eminent expert in

the field of economics and statistics, assessed a value of $225.00 a month for this one item. A hospitalization policy for his use and family use was furnished by the company. Because Mr. Higginbotham was employed for a company not as large as the defendants in this case, he was allowed considerable leeway in the form of entertainment for him and his family on his company expense account. Additionally, Mr. Higginbotham received other things of value from the safety award program. The evidence shows that he was awarded as many as 2400 S & H Green stamps monthly, if his rig operated without a lost time accident, plus a $50.00 United States Savings Bond at the end of six months and the equivalent of a $100.00 wrist watch at the end of an accident free year. Also, certain pleasure trips such as deer hunts were furnished by his employer as a token of the company's appreciation of his services. Also, according to the undisputed evidence, Mr. Higginbotham, had he lived, would have continued to enjoy increases in his earnings. Mr. Higginbotham and his family had commenced a business of raising running quarter horses, and at the time of his death, had accmulated ten horses. Mr. Higginbotham was a robust man and in excellent health at the time of his death.

8. For many months prior to his death, decedent had been assigned to work on locations in the Gulf of Mexico and worked thereon seven days at a time, followed by seven days off. While he worked offshore, he was furnished food and lodging by Mobil Oil Corporation without cost to him.

9. Because Mr. Higginbotham was employed by a company much smaller than Mobil, he had no scheduled retirement date. It was made very clear during the trial that Mr. Higginbotham had stable and regular employment with Baxter Drilling Company. Because Baxter did not have a stated policy of salary increases, Dr. Hamilton used the salary of D. W. Case, the man who replaced Mr.

Higginbotham after his death in trying to project a sensible rate of increase in the future. Dr. Hamilton presented three methods of calculation for pecuniary loss. Method one represents no change in salary at all from date of death. This method is not appealing. Method two was presented by using the salary of D. W. Case up to and including the date of trial with no change thereafter. This method of calculation also is not appealing because it is not likely that Mr. Higginbotham, with his most productive years ahead of him, would not have received a salary increase. Nevertheless, based on a salary of $15,000.00 a year which Mr. Case commenced receiving within a matter of a few months after Higginbotham's death, if these figures were used from date of death to June of 1973, Higginbotham's wage loss amounts to $87,500.00, not discounted, and from 1973 to 1990, the date on which Higginbotham would have reached age 65, this wage loss amounts to $202,329.00 plus the $87,500.00 or a total of $289,829.00. This would allow Higginbotham no wage increases from 1969 through 1990. Such an assumption is unreasonable.

The third method used by Dr. Hamilton embraced the salary of D. W. Case to the time of trial with approximately a five per cent (5%) annual increase thereafter. Dr. Hamilton reduced these figures to present values as of August 15, 1967, but since the money is not yet paid no reduction is to be made before judgment. The accrued loss of income from date of death to June 15, 1973, 70 months, approximates $93,940.00. This figure was arrived at by taking an expected average earning increase of $92.00 per month (D.W. Case received this) making a total monthly salary of approximately $1,342.00 with no discount up to June of 1973. This monthly salary of $1,342.00 was then projected to 1990 and discounted at five per cent (5%) making a total of $217,220.00. The $93,940.00 added to

$217,220.00 makes a total of $311,160.00. This amount has been reduced by a deduction of fifteen per cent (15%) for personal use, which reduces the net loss to the family to $264,486.00.

Mr. Higginbotham was furnished a car for his personal use while on the beach, an expense account for his personal use, and room and board while on the job. Also his personal consumption was small. The full use of an automobile until retirement, calculated from death to June of 1973 amounts to $15,750.00, not discounted. From June of 1973, to age 65 the loss is, discounted at five per cent (5%), $36,419.00 which makes a total loss of $52,169.00. Insurance, medical and hospital figures came to $3,049.00. not discounted because as Dr. Hamilton explained these costs are constantly on the rise.

10. Since decedent worked offshore two weeks out of every month, during which time he was furnished food and lodging without cost, since his personal needs were simple, and since his income was supplemented by the expense account and car, decedent required approximately fifteen per cent (15%) of his income for personal needs. This percentage is a fair and reasonable apportionment of Higginbotham's total income attributable to his personal use had he survived.

11. Higginbotham provided the guidance, care and discipline of a good father to the minor child Donna, who was residing in his household. His moral qualities, sense of values, beliefs and experiences in life, when considered with the close relationship which existed between him and his child, leads this Court to conclude that the minor child has sustained, during her minority, and will continue to sustain,

further loss from the lack of her father's care, guidance and discipline. This item of damages is assessed at $2,000.00 a year for the child throughout her minority and school years. The award to Donna Higginbotham for this item is $26,000.00.

12. The evidence was uncontradicted and unchallenged that decedent performed services in and about the house, assisting with the payment of bills, maintenance, transporting the family in his company car and on vacation trips. The Court is aware that services such as these have a value which the Court estimates at approximately $50.00 per month. The accrued loss and future loss amounts to approximately $11,956.00. This figure is comprised of an accrued loss of $50.00 per month for seventy (70) months or until June, 1973, or a total of $3500.00, not discounted. Then from June, 1973, decedent had approximately 25 years of reasonable life expectancy and this figure discounted at five per cent (5%) amounts to $8,456.00, or a total of $11,956.00.

13. The above enumerated elements constitute the damages allowable to the administratrix individually and in her representative capacity in this action. If the applicable law authorized an award of general damages, the Court, in this case, would find that the decedent and his wife were happily married for many years; that close and affectionate ties between him and his child did exist; and that each member of his family has sustained a loss from being deprived of his love, affection, companionship and society, and suffered emotional grief, as a result of his demise, in the following amounts:

Mrs. Marshall K. Higginbotham	$50,000.00
Donna Joyce Higginbotham	50,000.00
Total General Damages	$100,000.00

14. The pecuniary loss to Mrs. Marshall K. Higginbotham, surviving widow, and Donna Joyce Higginbotham, surviving dependent child, is as follows:

Loss of wages, to date	$93,940.00	
Future loss of earnings, discounted	$217,220.00	
Total Wage Loss		$311,160.00
Less fifteen per cent (15%) attributable to decedent's personal use	$ 46,674.00	
Net Loss to Family		$264,486.00
Loss of Employer's Contributions to Insurance, Medical & Hospital		$ 3,049.00
Loss of personal use of an automobile furnished as additional salary, to date	$15,750.00	
Loss of future use of automobile for personal use, discounted	$36,419.00	

Total loss of use of automobile for personal use		$ 52,169.00
Extra items in connection with employment including savings bonds and other valuables, to date	$ 1,400.00	
Future loss of extra items in connection with employment including savings bonds and other valuables, discounted	$ 3,237.00	
Total extra items		$ 4,637.00
Loss of services to the family, to date	$ 3,500.00	
Loss of services in the future for life expectancy discounted	$ 8,456.00	
Total loss of services		$ 11,956.00
Loss of nurture to Donna Joyce Higginbotham		$ 26,000.00
TOTAL PECUNIARY LOSS		$ 362,297.00

In addition to the lump sum award for nurture, that portion of the pecuniary loss to the minor should be distributed to her at the rate of $4,000.00 per year during minority or a total of $36,000.00. The remainder of the award for pecuniary loss is recoverable by the widow and totals $300,397.00.

JAMES L. SHINN

1. As per Letters Testamentary, issued by the Sixteenth Judicial District Court for the Parish of St. Mary, in the proceedings entitled "Succession of James L. Shinn," bearing docket No. 8213, dated August 12, 1968, plaintiff, Mrs. Arline J. Shinn, is the duly qualified testamentary executrix of the succession of James L. Shinn, and personal representative of his estate.

2. At the time of his death, James L. Shinn had been married to the said Arline Jones Shinn since March 5, 1931, and they had lived together continuously and without separation until his death.

3. The said James L. Shinn was born September 23, 1908, and at the time of his death was fifty-eight years old and had a reasonable life expectancy of 16.8 years. Mrs. Shinn was born on July 13, 1912, and, according to the life tables in evidence, had a reasonable life expectancy in excess of that of her husband. Six children were born of their marriage; namely: Patsy, on October 27, 1933; Phillip, on November 9, 1937; Eldon, on December 7, 1941; James, on January 25, 1944; Gene, on July 15, 1951; and Linda, on October 20, 1955.

4. At the time of the casualty, decedent, his wife, their fifteen-year-old son, Gene, and eleven-year-old daughter, Linda, resided together in Morgan City, Louisiana, in a mobile home at a camp furnished by decedent's employer, Mobil Oil Corporation.

5. Mrs. Shinn and the minor children, Gene and Linda, were dependent upon decedent for their support and subsistence. None of the major children lived in decedent's household at the time of the casualty, nor did they depend upon him for their support.

6. Although the evidence does not indicate the length of time which elapsed while the ill-fated helicopter was crashing, we find that the resultant crash was for all practical purposes instantaneous, thus precluding any award for conscious pain, suffering and mental anguish.

7. At the time of his death, decedent, Shinn, was a senior drilling foreman, or toolpusher, employed by defendant Mobil, for whom he had worked continuously since 1936. Mr. Shinn was employed at a salary of $1,135 per month, plus a ten per cent (10%) bonus for working offshore, or a total wage of $1,249.00 per month. He received, also, certain fringe benefits from his employer and was a participant in all of the benefit plans provided by Mobil, including the savings plan, retirement annuity plan, group life insurance plan and medical insurance program.

8. For many months prior to his death, he had been assigned to work aboard the submersible drill barge, Penrod Drill Barge No. 50, on location in the Gulf of Mexico. His employment duties required him to work on the barge for seven days at a time, followed by seven days of office work at Mobil's headquarters in Morgan City. Then he returned for another seven days on the drill barge, followed by seven days of "off time." While he worked offshore aboard the drilling barge, his employer furnished him with food and lodging.

9. Mr. Shinn had been employed by Mobil for more than thirty years, and was scheduled to retire on October 1,1973.

His employment up to the time of his demise was stable and regular. According to information furnished by Mobil, Mr. Shinn was scheduled to receive a salary increment at an annual rate of approximately 5-6 per cent through 1970 and approximately 5-1/2 to 6-1/2 per cent through 1972. The accrued loss of income from the date of death to June 15, 1973, seventy (70) months, approximates $106,000.00. Since this amount has accrued, no present-value discount is required. In addition, we find decedent would have earned future wages until his retirmenent October 1, 1973, which, when discounted at a rate of five per cent (5%), which this Court finds reasonable, amounts to approximately $3,865.00.

10. Since decedent worked offshore two weeks out of every month, during which time he was furnished food and lodging without cost to him, and since his personal needs were rather simple (he had no expensive hobbies, did not drink or smoke, did not wear expensive clothes), the Court finds that the decedent required about fifteen per cent (15%) of his income for his personal needs. This percentage is a fair and reasonable apportionment of Shinn's total income attributable to his personal use had he survived.

11. The Court further finds that the contributions of Mobil for hospital and medical insurance to which the Shinn family was entitled, up to the date of Mr. Shinn's retirement amounts to $459.00. This loss has accrued also.

12. The value of Mobil's contributions to the savings plan in which Shinn was a participant, amounting to five per cent (5%) of his annual wages, computed to the date of his retirement, totals approximately $5,493.00 to which the claimants are entitled.

13. Had Mr. Shinn survived and retired as anticipated, he would have received a retirement pension from the date of his retirement until death (his life expectancy at retirement was 10.7 years) at an annual rate of $6,970.00. The gross value of this pension amounts to approximately $90,430.00 and, when discounted at the rate of five per cent (5%), the present value of these benefits is $52,105.00. It is not unreasonable to assume that during his retirement Mr. Shinn would utilize more of his income personally than he was using during his working life. His minor son would have reached majority, and, presumably, would not have depended upon support from his father; and the minor daughter would be approaching majority and presumptive independence. From the evidence given by Doctor Hamilton, the Court finds that the net loss to the family amounts to approximately one-half of the value of the retirement benefits, or approximately $26,053.00.

14. Shinn provided the guidance, care and discipline of a good father to the minors, Gene and Linda, who, were residing in the household. His moral qualities, sense of values, religious beliefs and experience in life, when considered with the close relationship which existed between him and his children, leads the Court to conclude that the minor children have sustained, and during their minority will continue to sustain, further loss from the lack of their father's care, guidance and discipline. This item of damages is assessed at the rate of $2,000.00 per year, per child, throughout the child's minority. The award to Gene for this item of damage is $10,000.00; to Linda, the sum of $20,000.00.

15. Based on the evidence which was uncontradicted and unchallenged, the Court finds that decedent was mechanically skilled and performed services in and about the house,

repairing things, maintaining the family automobile, cutting the grass, assisting with the payment of bills, transporting the family in the family car and escorting the family on vacation trips. The Court is aware that services such as these have a value, which the Court estimates at approximately $50.00 per month. The accrued loss and future loss, appropriately discounted, amounts to $8,000.00.

16. The above enumerated elements constitute the damages allowable to the administratrix, individually and in her representative capacity in this action. If the applicable law authorizes an award of general damages, that is to say, damages for nonpecuniary loss, the Court, in such case, would find that the decedent and his wife were happily married for many years, that close and affectionate ties existed between him and all of his children, that each member of his family has sustained a loss from being deprived of his love, affection, companionship and society, and suffered emotional grief as a result of his demise. Therefore, the Court would allow damages for this loss in the following amounts:

Mrs. Arline J. Shinn	$25,000.00
Gene Shinn	25,000.00
Linda Shinn	25,000.00
Patsy Shinn	20,000.00
Phil Shinn	20,000.00
Eldon Shinn	20,000.00
James Shinn	20,000.00

making a total of $155,000.00 general damages.

17. The pecuniary loss to Mrs. Arline J. Shinn, surviving widow, and Gene and Linda Shinn, surviving dependent

children, is as follows:

Loss of wages, to date	$106,000.00	
Future loss of earnings, discounted	3,865.00	
Total wage loss	$109,865.00	
Less fifteen per cent (15%) attributable to decedent's personal use	- $ 16,470.00	
Net loss to family		$ 93,395.00
Loss of employer's contribution to savings plan		$ 5,493.00
Loss of employer's contribution to hospital and medical insurance plan		$ 459.00
Loss of retirement pension benefits, discounted	$ 52,105.00	
Less fifty per cent (50%) attributable to decedent's personal use	- $ 26,052.00	
Net retirement pension benefits due to family		$ 26,053.00
Loss of nurture: Gene Shinn		$ 10,000.00

Linda Shinn	$20 , 000 . 00
Loss of services, discounted	$ 8,000.00
TOTAL PECUNIARY LOSS	$163,400.00

18. In addition to the lump-sum aware for nurture, that portion of the other pecuniary losses to which the minors are entitled, namely, $15,000.00 to Gene Shinn and $30,000.00 to Linda Shinn,should be distributed to them at the rate of $3,000.00 per year, per child, during minority. The remainder of the award for pecuniary loss, namely, $88,400.00, is recoverable by the widow.

CONCLUSIONS OF LAW

Mrs. Francis Nell Higginbotham, as Testamentary Executrix of the Succession of Marshall K. Higginbotham, and as personal representative of his estate, has standing to sue for the claims arising from his death under the Death on the High Seas Act and under the General Maritime Law. 46 U. S.C.A. § 688; 46 U.S.C.A. §§761, 762; *Lindgren v. U.S.*, 281 U.S. 38, 50 S.Ct. 207, 74 L.Ed. 688 (1930); *Morange v. States Marine Line, Inc.*, 398 U.S. 75, 90 S.Ct. 772, 26 L.Ed. 2d 339 (1970). Likewise, Mrs. Arline J. Shinn, as Testamentary Executrix of the Succession of James L. Shinn, and as personal representative of his estate, has standing to sue for the claims arising from his death under the Jones Act, the Death on the High Seas Act, and the General Maritime Law. 46 U.S.C.A. § 688; 45 U.S.C.A. §§51, 59; 46 U.S.C. §§ 761, 762; *Lindgren v. U.S., supra; Morange v. States Marine Lines, Inc., supra; Futch v. Midland Enterprises, Inc.*, 344 F.Supp. 324 (M.D. La. 1972), *aff'd* Jan. 8, 1973, *unreported* (No. 72-2900, 5th Cir.)

The personal representative of each of the decedents may recover for the actual pecuniary loss occasioned by the death. This is the measure of damages under theJones Act, the Death on the High Seas Act, and the General Maritime Law. 46 U.S.C.A. § 688; 45 U.S.C.A. § 51; 46 U.S.C.A. §§761, 762; *Michigan Central Railway Co. v. Vreeland*, 227 U.S. 59, 33 S.Ct. 192, 57 L.Ed. 417 (1913); *Neal v. Saga Shipping Co.*, 407 F.2d 481, (5th Cir. 1969); *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1959), *cert. denied* 361 U.S. 88, 80 S.Ct. 157, 4 L.Ed. 2d 121.

Under all of the applicable laws, the Jones Act, the Death on the High Seas Act, and the General Maritime Law, the dependent survivors of each of the decedents are entitled to recover damages for the loss of contributions and support that they would have received out of the accrued and future gross earnings of the decedents had they lived. *Stock v. Chicago Northshore and Milwaukee Railroad Co.*, 203 F.2d 786; *Canal Barge Co., Inc. v. Mary Kathryn Griffith*, No. 71-2226, 5th Cir. 1973; *Morange v. States Marine Lines, Inc., supra; National Airlines, Inc. v. Stiles, supra.*

In determining the extent of loss from future earnings, the Court should consider the decedents' actual earnings at the time of death, his work habits, and his prospects for advancement. *Petition of Risdal & Anderson, Inc.*, 291 F. Supp. 353 (D.C. Mass. 1968); *Petition of Canal Barge Co.*, 323 F.Supp. 805 (N.D. Miss. 1971). The Court should make no deduction for State and Federal income taxes where the yearly estimated earnings, as here, are not clearly above the reach of the middle income scale. *Canal Barge Co., Inc. v. Mary Kathryn Griffith, supra; Blue v. Western Railway*, 469 F.2d 487, 492-96 (5th Cir. 1972); *petition for cert. filed*, 41 U.S. L.W. 3393 (Jan. 10 1973) (No. 72-972);

In Re Marina Mercante Nicaraguense, S.A., 364 F.2d 118 (2nd Cir. 1966), *cert. denied*, 385 U.S. 1005, 17 L.Ed. 2d 544 (1967); *McWenny v. New York, N.H. and H. R. R.*, 282 F.2d 34 (2nd Cir. 1960), *cert. denied*, 364 U.S. 870, 81 S. Ct. 115, 5 L.Ed. 2d 93; *Cox v. Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967), *cert. denied*, 389 U.S. 1044, 88 S.Ct. 788, 19 L.Ed. 2d 836.

Post award losses must be discounted or reduced to present value. We find that under the economic conditions governing this case, a discount rate of five per cent (5%) is proper. *Chesapeake & Ohio Railway v. Kelly*, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117 (1916); *Blue v. Western Railway of Alabama, supra.*

Privation of parental nurture and guidance to a minor child is an element of pecuniary loss long recognized by federal decisions. *Michigan Central Railway Co. v. Vreeland, supra; Petition of Risdal, supra.* The value of parental nurture, as heretofore found, varies directly with his quality and quantity. *Moore-McCormick Lines, Inc. v. Richardson*, 295 F.2d 583 (2nd Cir. 1961).

Loss of the decedents' services is another pecuniary loss allowable under the laws applicable herein. *Michigan Central Railway Co. v. Vreeland, supra; Dennis v. Central Gulf S.C. Corp.*, 453 F.2d 137 (5th Cir. 1972). Such services of which the Higginbothams and the Shinns have been deprived in the instant case have a definite value although the value has not been established to the penny. To allow a tort-feasor to avoid paying damages, however, because such damages were to some necessary extent imperfectly established, would be unjust and unbearable. *Canal Barge Co., Inc. v. Mary Kathryn Griffith, supra; ABC Paramount*

Records, Inc. v. Tops Record Distributive Co., 374 F.2d 455 (5th Cir. 1967); *See also, Bigalow v. RKO Radio Pictures*, 327 U.S. 251, 264, 66 S.Ct. 754, 780, 90 L.Ed. 2d 652, 660 (1946).

Since the decision in *Morange, supra,* there have been district court decisions awarding damages for non-pecuniary losses, such as loss of society and survivors' grief. *In Re Sincere Navigation Corp.*, 329 F.Supp. 652 (E.D. La. 1971); *In Re Farrell Lines*, 339 F.Supp 91 (E.D. La. 1971); however, the circuit courts which have considered the issue have uniformly denied grief damages in a general maritime action. *Canal Barge Co., Inc. v. Mary Kathryn Griffith, supra; Green v. Vantage S.S. Corp.*, 466 F.2d 159 (4th Cir. 1972); *Simpson v. Knutsen, O.A.S.*, 444 F.2d 523 (9th Cir. 1971); *In re U.S. Steel Corp.*, 436 F.2d 1256 (6th Cir. 1970). Consequently notwithstanding our factual finding that the survivors have suffered loss of love and affection, and grief as a result of the demise of Mr. Higginbotham and Mr. Shinn we disallow this item of damage. *Canal Barge Co., Inc. v. Mary Kathryn Griffith, supra.*

Pre-judgment interest is discretionary with the court in death claims under the Jones Act, the Death on the High Seas Act, and the General Maritime Law. *Doucet v. Willis Drilling Co.*, 467 F.2d 336 (5th Cir. 1972); *National Airlines Inc. v. Stiles, supra; In re U.S. Steel Corp., supra.* In order to compensate the parties fairly and justly for their losses, the Court will allow pre-judgment interest on these claims at the rate applicable in this form, from date of death, August 15, 1967.

Although we are aware of *Soileau v. Nicklos Drilling Co.*, 302 F.Supp 119 (W.D. La. 1969), which allowed an award for expected accumulation of community property, we feel

that such an award in this case would be far too speculative.

In determining the amount of the awards for loss of future earnings, we did not take into consideration the decreasing purchasing power of the dollar. Although there are some cases which hold that it is proper to include in this computation costs of living increases, *Cunningham v. Bay Drilling Co.*, 421 F.2d 1398 (5th Cir. 1970); *Canal Barge Co., Inc. v. M. K. Griffith, supra.* we feel that such an additional award would have to await the final outcome of the Fifth Circuit Court of Appeals en banc rehearing of *Johnson v. Penrod Drilling Co.* (Nos. 71-2243, 71-2245).

Plaintiffs should submit a judgment for execution in accordance with Rule 9(e) of this Court.

THUS DONE AND SIGNED in Chambers, at Alexandria, Louisiana, on this 25th day of June, 1973.

S/ Naumann S. Scott
UNITED STATES DISTRICT
JUDGE

APPENDIX - B

OPINION OF CIRCUIT COURT OF APPEALS

Mrs. Francis Nell HIGGINBOTHAM, Admx., etc., of Marshall K. Higginbotham, Deceased, etc., et al., Plaintiffs - Appellees Cross-Appellants,

v.

MOBIL OIL CORPORATION, et al., Defendants-Appellants Cross-Appellees

Mrs. Wanda Moore LONG, Admx. of the Estate of Deceased Joseph C. Long, Jr., etc., PLaintiff-Appellant

v.

BELL HELICOPTER CO., etc., Defendant-Appellee

Jeanette LeBlanc NATION, Personal Representative for Ella Menard Nation and Roy Glen Nation, Plaintiffs-Appellants,

v.

TEXTRON INDUSTRIES, INC., etc., et al., Defendants-Appellees.

Mrs. Arline J. SHINN, Individually, etc., et al., Plaintiffs-Appellants,

v.

MOBIL OIL CORPORATION and Bell Helicopter, Defendants-Appellees.

No. 74-1275

United States Court of Appeals, Fifth Circuit

Jan. 13, 1977.

Consolidated actions were brought as a result of the death of a pilot and three passengers in a helicopter crash in the Gulf of Mexico. Defendants were the owner operator of the helicopter and the manufacturer. The manufacturer was exonerated, but the owner operator found liable, by the United States District Court for the Western District of Louisiana, Opelousas Division, Nauman S. Scott, J. 357 F. Supp. 1164. Damages were subsequently awarded, 360 F. Supp. 1140. On appeal by all parties except the manufacturer, the Court of Appeals, Thornberry, Circuit Judge, held that the owner operator had properly been held liable. Contrary to the finding of the district court, one passenger, employer by the owner operator, was a seaman on the date of his death, for which there was liability under the Jones Act. Testimony concerning future wage increases was insufficient to support an award based upon a five per cent future earnings increase factor. Death on the High Seas Act was not exclusive wrongful death remedy outside of state territorial waters, and, under maritime wrongful death remedy, representatives of decedents, on proper proof, could recover for loss of society. If representatives of the seaman could establish their right to recovery under maritime wrongful death remedy, their recovery under the Jones Act was not a bar to an award for loss of society.

Affirmed in part; reversed in part and remitted.

Godbold, Circuit Judge, filed an opinion concurring in part and dissenting in part.

Gee, Circuit Judge, filed an opinion concurring in part and dissenting in part.

1. Products Liability -- 75

Causation must be established under doctrine of strict liability, as well as under ordinary negligence.

2. Evidence -- 570

Expert testimony is not controlling but, rather, its credibility is for trier of fact.

3. Courts -- 406.3(22)

Trial judge's reliance on metallurgical evidence for substantiation or refutation of plaintiffs' theory of causation of helicopter crash was understandable whether he was subjectively concerned with negligence or with strict liability, and thus there was not shown any mistake of law to render inapplicable the general rule that trial court's findings would be accepted unless clearly erroneous.

4. Aviation -- 13

Evidence sustained finding that plaintiffs had not carried their burden of proof, against manufacturer of helicopter, as to whether cause of crash was metal fatigue.

5. Negligence -- 121.2(12)

Applicability of res ipsa to any species of accident depends in first instance upon whether mishap is of type that ordinarily does not occur in absence of negligence; rule is based upon human experience, and its application to particular situation must necessarily vary with human experience.

7. Negligence -- 121.2(12)

Application of res ipsa to one defendant and not to another requires that circumstances surrounding injury render it more probable that injury was due to that defendant's negligence than that of the other defendant.

8. Negligence -- 121.2(7)

Every possible alternative cause of injury need not be totally excluded for res ipsa to apply; all that is necessary is that likelihood of other causes be sufficiently reduced that fact finder may reasonably conclude from preponderance of evidence that fault, if any, is attributable to party against whom doctrine is employed.

9. Courts -- 406.3(22)

Where, although trial judge could not attribute helicopter crash to any specific cause, he concluded that, as to helicopter operator, total effect of evidence afforded reasonable inference of fault, no clear error was shown in his finding of negligence on part of operator or in trial judge's being aided by doctrine of res ipsa loquitur, though he found "insufficient" evidence rather than "no" evidence of negligence on part of manufacturer.

10. Seamen -- 29(2)

Once it is established that claimant is seaman, Jones Act permits recovery even if he sues for injuries received while off ship and engaged in temporary work for his employer unreleated to service of the ship. Jones Act, 46 U.S.C.A. §688; Longshoremen's and Harbor Workers' Compensation

Act, §§1 et seq., 5, 33 U.S.C.A.§§901 et seq., 905.

11. Seamen -- 29(5.16)

Generally, determination of whether individual is "seaman" within purview of Jones Act or maritime law is purely factual matter for determination by jury or fact finder. Jones Act, 46 U.S.C.A. § 688.

See publication Words and Phrases for other judicial constructions and definitions.

12. Seamen -- 29(2)

Situs of work is not determinative in Jones Act case; seaman, once he has become such, retains his status so long as he performs substantial part of his work on the vessel. Jones Act, 46 U.S.C.A. §688.

13. Courts -- 406.3(10)

Where trial judge's finding was tainted by misapprehension of controlling legal principles, review of evidence by Court of Appeals was free from constraints of clearly erroneous rule.

14. Seamen -- 2

Where during two years prior to his death decedent spent all but small fraction of his working time on submersible drilling barges and where, as drilling foreman, he plainly contributed to mission of drilling barges upon which he was normally stationed, and he was assigned to fixed platform where he had worked during week preceding his death only

as presumably temporary replacement for vacationing foreman, he was, though assigned to work on fixed platform from which he departed as passenger in helicopter which crashed, a "seaman" employee, and his representatives were entitled to maintain Jones Act action for his death. Jones Act, 46 U.S.C.A. § 688; Longshoremen's and Harbor Workers' Compensation Act, §§ 1 et seq., 5, 33 U.S.C.A. § §901 et seq., 905; Outer Continental Shelf Lands Act, §4(b, c), 43 U.S.C.A. § 1333(b,c).

15. Death -- 58(2)

In absence of any evidence to support award for conscious pain and suffering prior to death, recovery for pain and suffering was properly denied in actions under Death on the High Seas Act, Jones Act, and General maritime law. Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, §1 et seq., 46 U.S.C.A. §761 et seq.

16. Death -- 58(1)

To recover at all for future wage raises, plaintiff was required to bear difficult burden of proving what portion of increases would have been given other than as automatic hedge against inflation, and, although trial judge specifically stated he did not take into consideration decreasing purchasing power of dollar, award based upon five percent future earnings increase factor could not stand.

17. Death -- 67

It is within trial judge's discretion to reject any testimony concerning future wage increases as too speculative to support recovery.

18. Death -- 88

Death on High Seas Act was not exclusive wrongful death remedy outside of state territorial waters, and, under maritime wrongful death remedy, representatives of decedents, on proper proof, could recover for loss of society. Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

19. Death -- 91

If representatives of seaman could establish their right to recovery under maritime wrongful death remedy, their recovery under Jones Act was not bar to an award of damages for loss of society. Jones Act, 46 U.S.C.A. § 688.

* * * * *

Appeals from the United States District Court for the Western District of Louisiana.

Before THORNBERRY, GODBOLD and GEE, Circuit Judges.

THORNBERRY, Circuit Judge:

These four consolidated actions were brought to recover damages for the death of the pilot and three passengers of a Bell Jet Ranger helicopter that crashed in the Gulf of Mexico. Plaintiffs sought recovery from Mobil Oil Company, who owned and operated the helicopter, and Bell Helicopter Company, who manufactured it. Mobil cross-claimed against Bell for the cost of the aircraft and for indemnity as to any amounts it might be required to pay to the individual plaintiffs. The district court held Mobil liable for the death of Higginbotham, one of the passengers,

under the Death On the High Seas Act[1] (DOHSA) and general maritime law. It likewise held Mobil liable for the death of Shinn, another passenger, under DOHSA, the Jones Act,[2] and general maritime law. The court found that Nation, the third passenger was a nonseaman employee of Mobil; thus, his representative's recovery was limited to benefits payable under the Longshoremen's and Harbor Workers' Compensation Act[3] (LHWCA). Finally, the district court exonerated Bell entirely, cutting off any recovery by pilot Long's representatives, who sued only Bell.[4] All parties appeal, except Bell.

I

The chief contentions raised in this court concern the district judge's (1) exculpation of Bell, (2) his application of res ipsa loquitur in finding Mobil liable to Shinn's and Higginbotham's representatives, and (3) his ruling as to pas-

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1. 46 U.S.C.§ 761 *et seq.* The district judge concluded that admiralty jurisdiction existed over this suit because the accident took place on the high seas and "in conjunction with its extensive offshore activities." 357 F.Supp. 1164, 1167. We think this conclusion correct under *Executive Jet Aviation v. Cleveland,* 1972, 409 U.S. 249, 93 S.Ct493, 34 L.Ed. 2d 454. Admiralty jurisdiction over aircraft accidents occurring on the high seas is not automatically ousted because the craft initially took off from or is normally based within the continental United States. See *In re Dearborn Marine Serv., Inc.* 5 Cir. 1974, 499 F.2d 263, 272 n.17; *Roberts v. United States,* 9 Cir. 1974, 498 F.2d 520, 523-24; *cf.* American Home Assur. Co. v. United States, M.D. Pa. 1975, 389 F.Supp. 657.

2. 46 U.S.C.§ 688. The court found, and defendants do not contest, that Shinn's work on a drilling barge made him a Jones Act seaman.

3. 33 U.S.C§ 901 et seq.

4, The district judge's decision as to Bell naturally also required dismissal of Mobil's cross-claims.

senger Nation. The parties also raise a number of subsidiary issues that require discussion. Nevertheless, the facts of the case are fairly straightforward. Mobil used the Bell-manufactured helicopter as an airborne crewboat, ferrying workmen to and from offshore drilling sites. On August 15, 1967, sometime between 3:30 and 4:00 o'clock in the afternoon, the aircraft took off from Baxter Rig No. 3 with all four decedents aboard. When it failed to arrive at its scheduled destination a search was instituted, and the searchers soon discovered wreckage from the helicopter floating several miles from the craft's point of departure. Only a few pieces of the Jet Ranger were recovered, no one witnessed its crash, and no bodies were ever recovered. There had been no radio communication with the helicopter before its disappearance.

II.

The individual plaintiffs (and Mobil) contend that the district judge erred in holding that no case was made out against Bell. At trial they relied upon three different types of evidence to establish Bell's liability. First, they introduced the testimony of two "aircraft crash reconstruction" experts. These witnesses testified, in substance, that all physical evidence available – including the allegedly inverted position of the helicopter when it hit the water, the pattern of damage to the recovered portions of the craft, and the position of the tailboom almost one-half mile from the remainder of the wreckage -- indicated, or was consistent with the theory, that the tailboom separated from the helicopter in mid-air causing it to plummet out of control into the water. Second, to give some substance to their mid-air separation theory, plaintiffs (and Mobil) introduced the testimony of metallurgists who stated that in their opinion

the portion of the tailboom that was recovered contained a fatigue crack. From this crack, these witnesses theorized, a tension crack propagated over nearly the complete circumference of the boom, resulting in compression at the top of the boom and eventually a complete tearing off of the tail from the rest of the helicopter. Finally, plaintiffs (and Mobil) adduced evidence showing that the helicopter involved in the crash was of a new design and that repeated complaints concerning cracks appearing in the tails of these new aircraft compelled Bell to change the alloy used in the tailboom from magnesium to aluminum.

In brief summary, Bell's witnesses disputed the existence of any fatigue cracks in the tailboom, argued that the Jet Ranger represented the highest state of the art, and asserted that the cracks reported by other users of this model helicopter were viewed by Bell and most owners of the craft as a maintenance nuisance rather than a safety hazard. Bell's experts also offered explanations other than mid-flight separation of the tailboom for the pattern of damage to the recovered portions of the Jet Ranger.

The district judge weighed this testimony and entered the following findings of fact:

> The evidence does not establish that a fatigue fracture occurred in the tailboom . . . [and] is not sufficient to establish that an inflight separation of the tailboom caused the crash . . . . In fact, evidence is so insufficient that no actual, probable or suggestive cause of the crash . . . [can] be determined with any degree of certainty.

357 F.Supp. at 1171-72. In light of these adverse fact-findings and the spectre of the "clearly erroneous" rule,

plaintiffs (and Mobil) not unexpectedly invoke the doctrine that "findings induced by or resulting from a misapprehension of controlling substantive principles lose the insulation of F.R.Civ. P. 52(a) and a judgment based thereon cannot stand." *Continental Motors Corp. v. Continental Aviation Corp.*, 5 Cir. 1967, 375 F.2d 857, 859. Specifically, they argue that the trial judge erroneously believed that Bell could be held liable only for some particular negligent act, while in fact, plaintiffs say, they alleged and proved a good cause of action under the doctrine of implied warranty or strict products liability.

Their reasoning goes something like this. The district judge stated that "the case of plaintiffs and Mobil against Bell hinges entirely on the validity of its metallurgists experts . . . [T]he testimony of their other witnesses is principally corroborative . . . ." 357 F.Supp. at 1168. This statement, together with the judge's emphasis on whether the evidence supported the existence of a fatigue failure, reveals the lower court's belief that plaintiffs needed to prove a specific defect in the helicopter. Under products liability doctrines, however, no specific defect need be shown as long as plaintiff establishes that the product malfunctioned. Accordingly, the testimony of the accident reconstruction experts constituted the main thrust of the case– since that testimony suggested that the helicopter crashed after a mid-flight separation of the tailboom -- and the testimony of the metallurgists was merely corroborative and precautionary since no matter why the boom fell off, a helicopter whose tailboom did so under ordinary flight conditions must have been defective. Hence, the trial judge's misapprehension of the applicable law led him to emphasize the wrong evidence, and this mistaken emphasis accounts for his erroneous conclusion that the tailboom did not break off in mid-air.

Notwithstanding our respect for the ingenuity of plaintiff's theory, we cannot accept it.[5] Initially, we are not convinced that the district judge misunderstood the nature of plaintiffs' case. The complaint clearly alleged negligence, as well as other theories, and much of plaintiffs' evidence manifestly was intended to establish that Bell's testing and supervisory procedures were negligently conceived and executed. Hence, references to negligence in the lower court's opinion are hardly conclusive.

[1-3] Second, plaintiffs fail to understand that the judge's finding that no mid-flight separation took place goes primarily to causation and only circumstantially to the

5. It is worth mentioning that our court recently reserved the question whether products liability doctrine should be made a part of the general maritime law. *Williams v. Brasea,* 5 Cir. 1974, 497 F.2d 67, 78. This case, however, like *Williams*, is in our view an inappropriate vehicle for deciding the issue, because we conclude that the facts here are insufficient in any event to establish liability under the theory.

We recognize, of course, that a number of courts, including several district courts within this Circuit, have permitted admiralty suits based upon either the breach of an implied warranty or strict products liability. *See Lindsay v. McDonnell Douglas Aircraft Co.*, 8 Cir. 1972, 460 F.2d 631; *Streach v. Assoc. Container Transp. Ltd.*, C.D. Cal. 1975, 388 F.Supp. 935; *Houston-New Orleans, Inc. v. Page Engineering Co.*, E.D.La. 1972, 353 F.Supp. 890, 899; *Sears, Roebuck and Co. v. American President Lines, Ltd.*, N.D. Cal. 1971, 345 F.Supp. 395, 401-02; *Kropp v. Douglas Aircraft Co.*, E.D.N.Y. 1971, 329 F.Supp. 447, 455; *Ohio Barge Line, Inc. v. Dravo Corp.*, W.D. Wash. 1971, 326 F.Supp. 863; *In re Alamao Chemical Transp. Co.*, S.D. Tex. 1970, 320 F.Supp. 631, 634-38; *In re Marine Sulphur Transp. Co.*, S.D.N.Y. 1970, 312 F.Supp. 1081, 1102, *modified*, 2 Cir., 460 F.2d 89, *cert denied*, 1972, 409 U.S. 982, 93 S.Ct. 318, 34 L.Ed. 2d 246; *Soileau v. Nicklos Drilling Co.*, W.D. La. 1969, 302 F.Supp. 119, 126-27.

existence of a manufacturing defect.[6] As the Second Circuit recently noted:

> The burden of proving causation is on the plaintiff. . . and causation must be established under the doctrine of strict liability, as well as under ordinary negligence.

In re Marine Suplhur Queen, 2 Cir. 1972, 460 F.2d 89, 101-02; see also *Leverson v. Boeing Co.*, 9 Cir. 1975, 510 F.2d 937. Thus, whether the district judge believed that these cases were based upon negligence or upon strict liability, his inquiry concerning causation would be essentially the same.

6. This misunderstanding explains plaintiffs' erroneous reliance on *Lindsay v. McDonnell Douglas Aircraft Co.*, 8 Cir. 1972, 460 F.2d 631. In *Lindsay* the Eighth Circuit, after concluding that federal maritime law would and should adopt the doctrine of strict liability in tort, *id.* at 635-36, remanded the case to the district court for a determination of whether a fire observed on a crashing jet airplane was the cause of the accident. The court stated that plaintiff need not prove a specific defect, for the existence of a fire on board "would strongly indicate a malfunction in the aircraft itself resulting from some defect in either manufacture, material, or design." *Id.* at 637. Nevertheless, the court also warned that because the evidence was circumstantial, the inference of defective manufacture from a known malfunction was merely permissible, not compelled. *Id.* at 640. On remand, the district court found that the airplane was not on fire when it hit the water and concluded that plaintiff had not established the existence of a defect. *Lindsay v. McDonnell Douglas Aircraft Corp.*, E.D. Mo. 1972, 352 F.Supp. 633. Plaintiff again appealed, but this time the Eighth Circuit affirmed, holding that the lower court's findings were not clearly erroneous, *Lindsay v. McDonnell Douglas Aircraft Corp.*, 8 Cir. 1973, 485 F.2d 1288.

Lindsay was a stronger case than this one from the plaintiff's viewpoint. Mrs. Lindsay offered the testimony of a shrimp boat captain that he saw Mr. Lindsay's plane burning just before it crashed. Here plaintiffs had no direct evidence of mid-air separation of the tail-boom–analogous to the fire in *Lindsay*–so the trial judge to find Bell liable would have been required to infer not just the defect from the malfunction, but the malfunction itself.

Here plaintiffs' only explanation of the crash, as against Bell, was that the tailboom of the helicopter broke off in mid-flight. They needed to prove that theory before they could argue their strong circumstantial case that only a manufacturing defect could have caused such a failure. *Cf. Lindsay v. McDonnell Douglas Aircraft Co.*, supra, at 639-40; *Krause v. Sud-Aviation*, 2 Cir. 1969, 413 F.2d 428. The trial judge's statements about the relative importance of the two types of expert testimony offered by the plaintiffs almost certainly reflected his conclusion that the accident reconstruction evidence was utterly insufficient to establish that the tailboom came off in mid-air without some credible explanation of *why* such an unusual occurrence might have taken place. That is, he focused on the alleged specific defect not necessarily because he thought plaintiffs needed to prove such a defect by direct evidence in order to establish that Bell breached some duty toward persons in plaintiffs' position, but because without the alleged defect he could give no credence to plaintiffs' causation theory. The credibility of expert testimony is for the trier of fact; as this court only recently noted, "expert witnesses appear to assist in the court's decision-making process, not to control it." *Reyes v. Wyeth Laboratories*, 5 Cir. 1974, 498 F.2d 1264, 1289. Bell's witnesses sharply contradicted plaintiffs' accident reconstruction experts on the possibility of mid-air tailboom separation. Hence, we think that the trial judge's reliance on the metallurgical evidence for substantiation or refutation of plaintiffs' theory of causation is perfectly understandable regardless of which theory of Bell's duty--negligence or strict liability--he was subjectively concerned with. For the reasons stated, then, we reject plaintiffs' attempt to strip the lower court's factfinding concerning causation of its "clearly erroneous" shield.

[4] Plaintiffs do not rely solely on their mistake of law attack on the findings of fact, however. They also allege numerous errors in the district court's factual deductions, any one of which if established, they contend, would render the findings clearly erroneous. The voluminous record in this case plainly prevents us from summarizing and analyzing all of these evidentiary challenges. Nevertheless, we have carefully examined each one in light of the record and the district court's opinion. We note that plaintiffs steadfastly insist that their evidence was "uncontradicted." To the contrary, our examination of the record reveals that Bell's witnesses repeatedly contradicted plaintiffs' witnesses, both on the likelihood of mid-air separation of the tailboom[7] and on the existence of a fatigue crack at the area

7. As earlier noted, plaintiffs cite several items of "accident reconstruction" evidence to support their mid-air separation theory. These include: (1) the routine nature of the flight; (2) the pattern of damage to the recovered portions of the helicopter; (3) the position of the tailboom approximately one-half mile west of the other portions of the wreckage; (4) the allegedly inverted position of the aircraft when it hit the water; and (5) the absence of main rotor strikes on the tailboom.

Without purporting to summarize all of the contrary evidence, and without identifying particular pages in the appendix, the following rebuttal evidence either appears directly in the testimony or is inferable from it: (1) when the helicopter left the drilling rig low level flying conditions in the area were "very poor" due to intermittent showers and thundershowers in the general area; (2) the pattern of damage to the recovered portions of the craft were consistent with a full power crash into the choppy water with resultant tumbling of the helicopter in unpredictable ways; (3) the tailboom may have been either thrown west of the wreckage by the initial impact or blown west by the current and the wind, both of which were westerly; (4) the allegedly inverted attitude of the helicopter when it hit the water may have been attributable either to accidental pilot action or a malfunction in the controls; and (5) the absence of main rotor strikes on the tailboom refutes rather than supports plaintiffs' theory, because if the boom had torn off as plaintiffs argue it would have unavoidably entered the path of the rotor blades.

between six o'clock and eight o'clock on the circumference of the tail.[8] The district judge, who heard the testimony and viewed the exhibits, concluded that plaintiffs had not carried their burden of proof against Bell as to the cause of this unfortunate accident. We cannot say that his conclusion was clearly erroneous.[9] *See Leverson v. Boeing Co.*,

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8. Regarding the existence of a fatigue crack on the tailboom, plaintiffs relied heavily on the testimony of their metallurgists that certain grain deformation typical of tensile-shear failure did not appear in the area on the boom where they argued that the cracking began in fatigue. All of Bell's witnesses denied seeing any evidence of fatigue, and, as the district judge noted, other physical evidence contradicts the fatigue theory. As for the statement in the opinion that "practically the entire fracture occurred in compression," we do not view it, as plaintiffs do, as damning evidence of the district judge's misunderstanding of the metallurgical evidence. Taken in context it is reasonably clear that Judge Scott meant only to say that the extensive areas of compression on the tailboom clockwise between the nine o'clock and 4:30 positions (to which plaintiffs' witnesses testified, *see* App. at 639-640) were more consistent with Bell's "instantaneous static overload" view than with plaintiffs' "fatigue crack and tear" theory. Moreover, at one point in his testimony one of plaintiffs' own witnesses stated that the section of the boom discussed by Judge Scott "started failing in compression," before correcting himself by stating that as a "technical point" no metal fails in compression.

Judge Scott noted his "lack of expertise" in metallurgy. We likewise note ours. Perhaps our judicial system can and should develop better methods for trying difficult questions of scientific or technological fact. *See, e.g.*, Danaher, Piehler, Twerski, & Weinstein, *Product Liability; An Interaction of Law and Technology*, 12 Duquesne L. Rev. 425 (1974); *The Technological Expert in Products Liability Litigation*, 52 Texas L.Rev. 1303 (1974). Nevertheless, this case requires decision now and under our present system; we decline to overturn the considered findings of the district judge on the fatigue issue based only upon the simultaneous presence of disputed expert metallurgical testimony and ambiguous cracks. *See* Danaher, Piehler, Twerski, & Weinstein, *supra*, 12 Duquesne L.Rev. at 430 n. 11; 52 Texas L.Rev. at 1311.

9. The clearly erroneous standard is of course fully applicable to suits in admiralty. *Coulter v. Ingram Pipeline, Inc.*, 5 Cir. 1975, 511 F.2d 735, 736, n. 1.

supra; Lindsay v. McDonnell Douglas Aircraft Co., 8 Cir. 1973, 485 F.2d 1288; *Krause v. Sud-Aviation, supra; Montgomery v. Goodyear Aircraft Corp.*, 2Cir., 1968, 392 F.2d 777.

III.

Having eliminated Bell from the liability picture, the district court proceeded to inquire whether the individual plaintiffs had proved a case against Mobil. After considering the evidence in some detail the court concluded that the accident could not be attributed to any specific derelictions by that company. Nevertheless, aided by the doctrine of res ipsa loquitur Judge Scott ruled that the "total effect of the evidence" afforded a reasonably sufficient basis for attributing the crash to some negligence on the part of Mobil or its employees. Mobil's challenge to this finding requires us to answer two questions: (1) can the res ipsa loquitur doctrine be applied at all to aircraft crashes, and (2) if it can, is its application nonetheless barred here because plaintiffs introduced, along with their evidence against Mobil, evidence of Bell's responsibility for the crash?

Over thirty years ago this court addressed similar questions. In *Morrison v. LeTourneau Co.*, 5 Cir. 1943, 138 F. 2d 339, plaintiff sued both the owner and the operator of an airplane that crashed in unexplained circumstances, killing plaintiff's intestate. After reviewing the meager evidence concerning the cause of the accident, the court ruled that not even res ipsa loquitur could rescue plaintiff's case:

> The doctrine of res ipsa loquitur cannot apply in cases of this sort, because there is no showing that accidents of this very nature cannot happen to the most skillful pilots in planes of the finest type and condition. Even if

the doctrine of res ipsa loquitur were applicable, there would be the impossibility of determining the defendant against whom the rule should be applied, since the two de fendants are charged with separate and distinct acts of negligence. Would the jury be permitted arbitrarily to find that because a wing broke under the circumstances the Flying School furnished a defective ship, or that the ship was negligently operated by the LeTourneau Company? The doctrine of res ipsa loquitur does not supply the material answer that is requisite. Neither does the evidence. It was wholly impossible for the jury to have determined from the evidence, and the inferences reasonably to have been drawn therefrom, either that the ship was defective or that it was negligently operated by Le Tourneau. If the proven facts give equal support to each of two inconsistent inferences, then neither is established, and "judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitlted to recover".

138 F.2d at 341. The foregoing passage discloses that the court denied the applicability of the res ipsa on two grounds: first, because "there is no showing that accidents of this very nature cannot happen to the most skillful pilots in planes of the finest type and condition," and second, because the evidence did not permit the factfinder to choose, for purposes of fixing liability, between two defendants each of which was charged with "separate and distinct acts of negligence." As noted, Mobil urges that identical considerations require us to reverse the district court's judgment against it. We disagree.

A.

[5,6] The applicability of res ipsa to any species of accident depends in the first instance upon whether the mishap is of a type that ordinarily does not occur in the absence of negligence. As this court noted in an early case refusing to apply res ipsa to the explosion of a jet engine:

> Res ipsa loquitur is a rule based upon human experience and its application to a particular situation must necessarily vary with human experience. A situation to which the doctrine was not applicable a half century ago because of insufficient experience or lack of technical knowledge, might today fall within the scope of the rule, depending upon what experience has shown.

Williams v. United States, 5 Cir. 1955, 218 F.2d 473, 476. In 1943 when we decided *LeTourneau* air travel perhaps still seemed so inherently risky that people generally believed that aviation accidents could and did occur without human or mechanical failure. We think experience now teaches otherwise. Major improvements in design and manufacturing technology, in pilot training, and in ground control, communications, and navigational aids, among other things, have combined to give air travel an estimable safety record. By 1964 one distinguished commentator could write that "all the later cases" support the application of res ipsa to airplane crashes. W. Prosser, Law of Torts §39, at 220-21 (3d ed. 1964); *cf.* Annotation, 6 A.L.R. 2d 528. Our court has only recently implied that this use of res ipsa is well settled. *Kelly v. American Airlines, Inc.*, 5 Cir. 1975, 508 F.2d 1379, 1380 & n. 1. *See also* United States v. Johnson, 5 Cir. 1961, 288 F.2d 40, 45. Logic, experience, and precedent compel us to reject the argument that air-

plane crashes ordinarily occur in the absence of default by someone connected with the design, manufacture, or operation of the craft. *Accord, Cox v. Northwest Airlines, Inc.*, 7 Cir. 1967, 379 F.2d 893, *cert. denied*, 1968, 389 U.S. 1044, 88 S.Ct. 788, 19 L.Ed. 2d 836. Moreover, we see no meaningful distinction for these purposes between a fixed wing plane and a helicopter. Accordingly, we reject the first branch of Mobil's argument.

B.

[7,8] Mobil also argues, however, that "the application of res ipsa to one defendant and not to another requires that the circumstances surrounding the injury render it more probable that the injury was due to that defendant's negligence, than that of the other defendant." (Mobil Brief at 21-22). We entertain no doubt that this contention correctly states the law. *See, e.g., Dowdell v. U.S. Industries, Inc.*, 6 Cir. 1974, 495 F.2d 641, 644; *Domany v. Otis Elevator Co.*, 6 Cir. 1966, 369 F.2d 604, 613; W. Prosser, Law of Torts § 39, at 218 (4th ed. 1971). Moreover, cases can be found employing this reasoning to deny recovery in aircraft crash cases. *See Morrison v. LeTourneau, supra, Campbell v. First National Bank*, D.N.M. 1973, 370 F.Supp. 1096, 1098-99; *cf. Kelly v. American Airlines, Inc., supra; Kelly v. American Airlines, Inc., supra; Kelley v. Central National Bank of Richmond*, E.D. Va. 1972, 345 F.Supp. 737, 741; *Davies Flying Service v. United States*, W.D. Ky. 1953, 114 F.Supp. 776. It does not follow, however, that res ipsa loquitur dropped from this case as a matter of law when plaintiffs and Mobil offered evidence suggesting that a party other than Mobil may have been responsible for the accident. Every possible alternative cause of the injury need not be totally excluded for res ipsa to apply; all that is

necessary is that the likelihood of other causes be sufficiently reduced so that the factfinder may reasonably conclude from a preponderance of the evidence that the fault, if any, is attributable to the party against whom the doctrine is employed.[10]

For example, in *Colditz v. Eastern Airlines, Inc.*, S.D. N.Y. 1971, 329 F.Supp. 691, plaintiffs sued Eastern and Trans World Airlines for injuries suffered when airplanes operated by the two companies collided in mid-air. One issue before the court was whether plaintiffs could rely on res ipsa loquitur in attempting to make out their case. The airlines apparently argued that res ipsa was not available because the collision might have been caused by the negligence

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10. The Restatement (Second) of Torts §328 (d) states, in pertinent part:

> (1) It may be inferred that harm suffered by the plaintiff is caused by the negligence of the defendant when . . .
> (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence . . . .. (evidence added)

The comment to subsection (b) expands on this idea:

> It is never enough for the plaintiff to prove that he was injured by the negligence of some person unidentified. It is still necessary to make the negligence point to the defendant. On this too the plaintiff has the burden of proof by a preponderance of the evidence; and in any case where there is *no doubt* that it is at least equally probable that the negligence was that of a third person, the court must direct the jury that the plaintiff has not proved his case. *Again, however, the plaintiff is not required to exclude all other possible conclusions beyond a reasonable doubt, and it is enough that he makes out a case from which the jury may reasonably conclude that the negligence was, more probably than not, that of the defendant.* (emphasis added)

See also F. Harper & F. James, The Law of Torts § 19.7 (1956).

of the air traffic controllers in charge of directing the flight paths of the two aircraft. Despite substantial arguments offered to demonstrate the controllers' negligence, *see White v. Trans World Airlines, Inc.*, S.D.N.Y 1970, 320 F.Supp. 655, the district judge rejected the airlines' argument by noting that he had exonerated the controllers in a separate case arising out of the same accident. 329 F.Supp. at 693. In the instant case the district judge took up the issue of Mobil's and Bell's culpability in the same proceedings, but he considered Mobil's potential liability only after concluding that the plaintiffs had not carried their burden against Bell.

Even more in point is a recent decision by the Supreme Court of Texas. Plaintiffs sued Mobil Chemical Company for injuries they received when a pipeline safety valve at a Mobil plant ruptured and allowed acetic acid vapor to escape into the atmosphere. Plaintiffs were working near the site of the rupture and inhaled the vapor, causing the respiratory damage for which they sued. To establish Mobil's negligence, plaintiffs relied upon res ipsa. Mobil responded by adducing testimony indicating that the cause of the rupture was a structural defect in the valve -- for which the valve's manufacturer, if anyone, would be liable. The Texas court wrote:

> While the jury was certainly entitled to believe. . . . [Mobil's] explanation, it was not compelled to . . . Since the same mechanism had worked properly the day before, the jury could have concluded that any structural weaknesses were more probably caused by Mobil's maintenance personnel. . . than by causes prior to Mobil's control of the Unit. The jury also could have believed that Mobil's testing procedures were inadequate or negligently followed if it did not discover such structural

> weaknesses before pumping acid at high pressure through the system. In short, the jury could still reasonably infer from the circumstances of the accident that the accident was probably caused by Mobil's negligence.

Mobil Chemical Co. v. Bell, 517 S.W. 2d 245, 254 (Tex. 1974).

[9] In the instant case the district judge noted the evidence of (1) slipshod inspection practices by Mobil mechanics, (2) flights by Mobil pilots in excess of the recommended maximum airspeed for the helicopter, and (3) past "hot-rodding" by the Mobil pilot who died in this crash. Although he could not attribute the accident to any one of these causes, Judge Scott concluded that as to Mobil "the total effect of the evidence, affords a reasonable inference of fault." 357 F.Supp. at 1174. The record gives us no cause to doubt that the district judge took into account the strength of the evidence against Bell in assessing the "total effect of the evidence" against Mobil. Thus, no particular significance attaches, for instance, to the judge's couching his holding as to *Bell* in terms of "insufficient" rather than "no" evidence. In fact, Judge Scott's discussion of Mobil's inspection practices and the nature of the cracks that appeared in the tailbooms of other Jet Rangers suggests that he believed that even if the booms were defective from a maintenance viewpoint, they could have become a flight safety hazard only if the operator's inspection and repair practices were grossly negligent. Hence, his reasoning may have proceeded along lines identical to those the Supreme Court of Texas found permissible for the jury in *Mobil Chemical Co. v. Bell, supra.*

In any event, we may reverse the lower court's finding of

negligence only if we are convinced that it is clearly erroneous. *See Kennedy v. Henderscheid*, 5 Cir. 1973, 490 F. 2d 85. We are not left with the definite and firm conviction that Judge Scott erred in the inferences he drew from the circumstances of this case or in his conclusion that Mobil failed to rebut those inferences. *Compare Stevens v. Barnard*, 10 Cir. 1975, 512 F.2d 876, 879-81, with *Krause v. Sub-Aviation, supra*. Consequently, we affirm the judgment against Mobil.

IV.

The representatives of James Nation, another passenger who died in the crash of the Jet Ranger, urge us to reverse the lower court's holding that they can recover only under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. The district court found that at the time of his death Nation was employed by Mobil on a fixed drilling platform; hence, as a matter of law, he was not a seaman. Consequently, the court disallowed any claim under the Jones Act.[11] Nation's representatives, however,

11. Section 4(c) of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §1333(c), makes the Longshoremen's and Harbor Workers' Compensation Act applicable "with respect to disability or death of an employee resulting from any injury occurring as the result of operations described in subsection (b) of this section . . .." Subsection (b) covers "any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources. . . of the subsoil and seabed of the outer Continental Shelf." Moreover, we have construed §1333(c) to apply to injuries occurring as a result of operations described in subsection (b) without regard to the physical situs of the injury. *National v. Morris*, 5 Cir. 1973, 483 F.2d 577, 584, cert. denied, 1973, 414 U.S. 1071; 94 S.Ct. 584, 38 L.Ed. 2d 477; Bertrand v. Forest Co., 5 Cir. 1971, 441 F.2d 809, cert. denied, 1971, 404 U.S. 863, 92 S.Ct. 106, 30 L.Ed. 2d 107; *cf. In re Dearborn Marine Serv., Inc.*, 5 Cir. 1974, 499 F.2d 263, 271-77 (law applicable to suits

introduced evidence that Nation spent much of his time during the two years before his death working on submersible drilling rigs, which this court has held are Jones Act vessels. Moreover, the evidence also suggested that Mobil assigned Nation to the fixed drilling platform simply as a temporary replacement for a vacationing co-worker. Under these circumstances it is argued that Nation achieved the status of a Jones Act seaman because of his predominant employment on submersible drilling barges and despite temporary assignments by Mobil to nonseaman employment.

[10] In *Offshore Company v. Robison*, 5 Cir. 1959, 266 F.2d 769, our court held that to claim the status of seaman an injured workman must convince the factfinder that he was, inter alia:

(Footnote 11 continued)
against third parties for platform-related injury occurring on the high seas). Finally, the LHWCA provisions adopted by OCSLA are the *exclusive* remedy of the claimant against his employer. 33 U.S.C. §905.

Section 4(c) of the Act also provides, however, that "[f]or the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section -- (1) the term 'employee' does not include a master or member of a crew of any vessel . . .." Accordingly, we have held that OCSLA offers no obstruction to recovery by a Jones Act seaman for injuries occurring in connection with subsection (b) operations. *Noble Drilling Corp. v. Smith*, 5 Cir. 1969, 412 F.2d 952, cert. denied, 1969, 396 U.S. 906, 90 S.Ct. 221, 24 L.Ed. 2d 182. *See also Smith v. Falcon Seaboard, Inc.*, 5 Cir. 1972, 463 F.2d 206, cert. denied, 1972, 409 U.S. 1085, 93 S.Ct. 688, 34 L.Ed. 2d 672.

The implication of these statutes and decisions for Nation's representatives is that as against Mobil they may recover damages for their decedent's death, which occurred as a result of drilling operations on the outer Continental Shelf, only if Nation was a "member of a crew of any vessel," *i.e.*, a Jones Act seaman. *See Noble Drilling Corp. v. Smith, supra*, at 954-56.

> assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel.

266 F.2d at 779. Later cases have established the proposition that a workman may claim seaman's status despite being stationed on several different vessels during the course of his employment. *Braniff v. Jackson Avenue -- Gretna Ferry, Inc.*, 5 Cir. 1960, 280 F.2d 523, 528. See also *Magnolia Towing Co. v. Pace*, 5 Cir. 1967, 378 F.2d 12, 13; *Taylor v. Packer Diving and Salvage Co.*, E.D. La. 1971, 342 F.Supp. 365, 371, aff'd, 5 Cir. 1972, 457 F.2d 512. Moreover, once it is established that the claimant is a seaman, the Jones Act permits recovery even if he sues for injuries received while off ship and engaged in temporary work for his employer unrelated to service of the ship. *See Braen v. Pfeifer Oil Transp. Co.*, 1959, 361 U.S. 129, 80 S.Ct. 247, 4 L.Ed. 2d 191; *Crafton v. Tennessee Valley Sand & Gravel Co.*, 5 Cir. 1969, 408 F.2d 1096; *Taylor v. Packer Diving and Salvage Co., supra; cf. Doucet v. Wheless Drilling Co.*, 5 Cir. 1972, 467 F.2d 336, 338-39 ("The only requirement is that the seaman be 'doing the work of his employer pursuant to his employer's orders.' ")

[11-13] The lower court here found as a fact that Nation was not a seaman on the date of his death. Generally, "the determination of whether an individual is a 'seaman' within the purview of the Jones Act or the maritime law is a purely factual matter for determination by the jury or factfinder." *Ross v. Mobil Oil Co.*, 5 Cir. 1973, 474, F. 2d 989, 990. Nevertheless, it is clear that Judge Scott's finding on this issue was tainted by a misapprehension of

controlling legal principles set out above, for he ruled as to Nation "that as a matter of law his seaman's status is determined by the situs of his work at the time of his injury." 357 F.Supp. at 1177. As we have just indicated, however, situs of work is *not* determinative in a Jones Act case.[12] Accordingly, we have reviewed the evidence on Nation's employment status free of the constraints of the clearly erroneous rule. *See Stark v. Shell Oil Co.*, 5 Cir. 1971, 450 F.2d 994, 997; *Continental Motors Corp. v. Continental Aviation Corp., supra.*

[14] Our examination of the record discloses uncontradicted evidence (1) that during the two years prior to his death James Nation spent all but a small fraction of his working time on Mobil's submersible drilling barges, and (2) that Mobil assigned Nation to the fixed platform where he had worked during the week preceding his death as a presumably temporary replacement for a vacationing foreman. The record gives use no cause to believe that Nation's general pattern of employment would have changed substantially had he lived. Given these circumstances, we think that the undisputed evidence requires a finding that Nation was a seaman despite intermittent temporary assignments to fixed platforms as the course of drilling operations required.[13]

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12. Although it is true that a worker does not forever remain a seaman solely by virtue of having once been one, *see Desper v. Starved Rock Ferry Co.*, 1952, 342 U.S. 187, 72 S.Ct. 216, 96 L.Ed. 205, it does not follow that a seaman automatically loses his status when he is temporarily assigned by his employer to duties off the vessel. *Cf. Keener v. Transworld Drilling Co.*, 5 Cir. 1972, 468 F.2d 729. He retains his status so long as he "perform[s] a substantial part of his work on the vessel." Offshore Co. v. Robison, supra, at 779.

13. There can be no question here as to the second element of the *Robison* test, contribution to "the function of the vessel or to the accomplishment of its mission," 266 F.2d at 779, because as a drilling foreman Nation plainly contributed to the mission of the drilling barges upon which he was normally stationed.

Thus, since Mobil had assigned Nation to work on the fixed platform from which the fatal helicopter took off,[14] his representatives are entitled to maintain a Jones Act action for his death. We have summarily affirmed a district court that permitted a suit under the Jones Act on facts substantially similar to those involved here. *Taylor v. Packer Diving and Salvage Co., Inc., supra.* Accordingly, we reverse the district court's judgment as to Nation's representatives, direct entry of judgment in their favor under the Jones Act,[15] and remand for a determination of damages.

V.

[15] The representatives of Shinn and Higginbotham argue that the district court erred in certain respects concerning its determination of the amount of damages to which they were entitled.[16] Mobil also objects to a portion of the lower court's damages computations. The individual plaintiffs' first contention may be disposed of quickly. The court did not err in denying any recovery for the conscious pain and suffering of Shinn and Higginbotham before their deaths. There is simply no evidence in the record to support such an award. *See In re Dearborn Marine Serv., Inc., supra,* at 288.

[16, 17] More difficult is the question whether the district court erred in using a 5% annual straight line estimated

14. That is, Nation plainly was within the scope of his employment.

15. We have already approved the district court's finding that Mobil's negligence probably caused the crash.

16. The district judge's opinion on damages is reported at 360 F. Supp. 1140.

salary increase to calculate the probable future earnings of Marshall Higginbotham.[17] Mobil contends that this method of calculation amounts to an increase based upon inflation. Judge Scott specifically stated that "[i]n determining the amount of the awards for loss of future earnings, we did not take into consideration the decreasing purchasing power of the dollar." 360 F. Supp. at 1150. In so holding the judge correctly anticipated our recent *en banc* holding in *Johnson v. Penrod Drilling Co.*, 5 Cir. 1975, 510 F.2d 234. Nevertheless, Mobil argues that the 5% straight line annual increase amounted to a hidden inflation-based award because "it is common experience that annual 'raises' are for the most part cost of living wages." Mrs. Higginbotham rejoins that it is "speculative and inaccurate" to assume that all pay raises are cost of living increases rather than awards in "recognition of performance and experience."

Our cases appear conclusive on this problem. For example, in *Petition of Canal Barge Co.*, N.D. Miss. 1971, 323 F. Supp. 805, the district court held that:

> [Plaintiff's decedent] might have reasonably anticipated certain increases in his future earnings; such increases may fairly be calculated at the rate of 2% per year to the end of his work-life expectancy, which is to be also discounted. . . .

17. No similar problem arose as to James Shinn. Mobil, his employer, provided exact information on the pay raises to which he would have been entitled. Even more importantly, Shinn would have retired within a few months of the lower court's judgment, thus mitigating any difficulties as to post-judgment increases in earnings. 360 F. Supp. at 1146.

Id. at 814. On appeal this court initially approved the 2% factor, but treated it as a recovery for the "anticipated annual increase in the cost of living." *Canal Barge Co. v. Griffith*, 5 Cir. 1973, 480 F.2d 11. 28, *rev'd on this point on petition for rehearing*, 5 Cir. 1975, 513 F.2d 91·1. Likewise, in *Johnson v. Penrod Drilling Co.*, supra, the court treated the following finding as an award based upon inflationary factors:

> The wages of one performing the type of work that plaintiff was performing at the time of the accident in issue is likely to increase at the annual rate of 4.8% per annum. This percentage of annual increases in wages was the rate of increase of such wages from 1946 to 1969; and was the rate of annual increases which had held good from the year 1900.

510 F.2d at 238 In *Law v. Sea Drilling Corp.*, 5 Cir. 1975, 510 F.2d 242, the court similarly characterized this finding:

> Cost of living increases and inflation would cause an increase in loss of income from the death of Wesley Law at a rate of 2% per year . . .. Wesley Law was reasonably to be expected to increase his income based on the continued rise in his income reflected by his position and income tax returns.

510 F.2d at 251 & n.33. Finally, in *Robertson v. Douglas Steamship Co.*, 5 Cir. 1975, 510 F.2d 829, the court relied on *Johnson* to reverse an award based upon "loss of future wage increases or inflation or decrease in the purchasing power of money." *Id.* at 836. Manifestly, these cases make

no sharp distinction between "future wage increases"and outright allowances for the effect of inflation.

The Third Circuit has recently noted the close relationship between expert testimony purporting to project future pay raises and explicit inflationary considerations: "Although offered in terms of continuing increases in wage rates, as opposed to a continuing decline in the value of the dollar, the testimony in question reflects a continuing inflationary spiral." *Hoffman v. Sterling Drug, Inc.*, 3 Cir. 1973, 485 F.2d 132, 143, *cf. Magill v. Westinghouse Electric Corp.*, 3 Cir. 1972, 464 F.2d 294, 299-301. *See also* Brooks v. United States, D.S.C. 1967, 273 F.Supp. 619, 627-28. We believe that *Johnson v. Penrod Drilling Co.* and its progeny likewise stand for the proposition that courts may not simply assume that projected wage increases--whether calculated from the decedent's past earning experience or by some other means--would have been granted solely in "recognition of performance and experience." To the contrary, to recover at all for future raises plaintiff must bear the difficult burden of proving what portion of the increases would have been given other than as an automatic hedge against inflation.

Mrs. Higginbotham's economist arrived at the 5% figure for estimating Marshall Higginbotham's probable future annual wage increases by calculating the average annual percentage increases in Higginbotham's salary from the time he began working for Baxter Drilling Company (his employer at the time of the accident) until his death. App. at 2414-15. Included in this calculation was the assumption that Higginbotham, "a very capable tool pusher," would have maintained his past employment record. Nevertheless, the evidence sheds no real light on the basis of Higginbotham's

past raises -- *i.e.* whether they were cost of living bonuses or rewards for productivity.[18] Accordingly, the lower court's award based upon the 5% future earnings factor cannot stand. In view of the recent developments in this area, however, fairness demands that we remand to allow Mrs. Higginbotham an opportunity to prove her damages from the loss of her husband's future earnings according to the standards set out in this opinion. It remains, of course, within the trial judge's discretion to reject any testimony concerning future wage increases as too speculative to support recovery. *Cf. Bach v. Penn Central Transp. Co.*, 6 Cir. 1974, 502 F.2d 1117, 1122; *Hoffman v. Sterling Drug Co., Inc., supra; Magill v. Westinghouse Electric Corp., supra; Rideaux v. Lykes Bros. Steamship Co.*, S.D. Tex. 1968, 285 F.Supp. 153, 156.

[18, 19] As a final point, the representatives of Shinn and Higginbotham allege that because of changes in the law after the district judge decided this case they are now entitled to recover for an element of damages denied them by Judge Scott -- namely, loss of society or loss of love and affection. The district court denied recovery for these damages in reliance on *Canal Barge Co. v. Griffith, supra.* Subsequently, however, the Supreme Court in effect overruled the relevant part of that case by concluding that under the

18. The salary increases given Higginbotham's replacement as tool pusher were used by the district court to calculate the decedent's lost wages from the date of his death until the date of judgment. This evidence arguably eliminated the more troublesome problems concerning the speculativeness of that award. *Johnson* and the cases following it teach, however, that pre-judgment increases, paid either to the decedent before his death or later to his replacement, may not be applied mechanically to calculate *future* wage increases, because the employer's wage policy may be tied to the rate of inflation or to the cost of living index. *Cf. Eason v. Weaver*, 5 Cir. 1973, 484 F.2d 459.

nonstatutory maritime wrongful death action announced in *Moragne v. State Marine Lines*, 1970, 398 U.S. 375, 90 S.Ct. 1771, 26 L.Ed.2d 339, a decedent's dependents may recover damages for loss of society when death occurs in a state's navigable waters -- an area not covered by DOHSA. *Sea-Land Services, Inc. v. Gaudet*, 1974, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9. *See Canal Barge v. Griffith*, 5 Cir. 1975, 513 F.2d 911, 912 (on rehearing); *Skidmore v. Grueninger*, 5 Cir. 1975, 506 F.2d 716, 727-29.

Judge Scott found that both the Shinn and Higginbotham representatives were entitled to recover under the *Moragne* maritime wrongful death remedy; he refused to award damages for loss of society only because, as just noted, the law of the circuit at that time was that loss of society was not a compensable item in a *Moragne* action. In the course of his discussion Judge Scott concluded that *Moragne* is fully applicable to deaths occurring on the high seas, despite the existence of the remedy provided for by the Death on the High Seas Act. 357 F.Supp. at 1175. Although earlier reserving the question of the applicability of *Moragne* on the high seas, *In re Dearborn Marine Serv., Inc., supra* at 270 n.12, a panel of this circuit has since held "that *Moragne* applies not only to navigable waters of the States, but to the High Seas as well, including the area defined in DOHSA," and have accordingly awarded damages for loss of society for a death occurring beyond a marine league from shore. *Law v. Sea Drilling Co.*, 5 Cir. 1975, 510 F.2d 242, 250, *reh. denied, mofidied in part*, 5 Cir., 523 F.2d 793 (1975).[19] On remand, therefore the repre-

19. *Contra, Barbe v. Drummond*, 1 Cir. 1974, 507 F.2d 794, 800-02. If presented as an original matter, the members of this panel would be constrained to reach the result of the First Circuit in *Barbe*. While both *Barbe* and *Law* are undoubtedly correct in extending the right to

sentatives of Shinn and Higginbotham should be permitted to recover this item of damages.[20]

Affirmed in part; reversed in part and remanded.

GODBOLD, Circuit Judge, concurring in part and dissenting in part:

I agree with Judge Thornberry except for that portion of Part V of his opinion that relates to Higginbotham's future earnings.

On the res ipsa loquitur point I add the following comments. We do not overrule either *Morrison v. LeTourneau*, 138 F.2d 339 (CA 5, 1943), or *Williams v. U.S.*, 218 F.2d 473 (CA5, 1955). *Morrison* was a 1943 decision concerning the 1940 crash of a two place "cub" plane. Res ipsa was inapplicable for several reasons. It was unknown whether the defendant's agent or the other person in the plane was in control as pilot; there were severe winds at the scene; there was no showing that accidents of the type involved could not happen to the most skillful pilots in planes of the finest

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recover for pain and suffering to deaths occurring on the high seas, the opinion in *Law* fails to distinguish between damages recoverable as survival items and as wrongful death items. Conscious pain and suffering is traditionally – and logically -- a survival item. Loss of love and affection, or loss of society, on the other hand, is traditionally a wrongful death item. The members of the panel would read *Moragne* to say that DOHSA is the exclusive *wrongful death* remedy outside of state territorial waters. The decision in *Law*, however, forecloses this issue for the panel.

20. If the representatives of James Nation can establish their right to recover under *Moragne*, their recovery under the Jones Act will not bar an award of damages for loss of society. *Landry v. Two R. Drilling Co.*, 5 Cir. 1974, 511 F.2d 138; *McDonald v. Federal Barge Lines, Inc.*, 5 Cir. 1974, 496 F.2d 1376.

type and condition. As to the first two elements, they are not present in the instant case. As to the third, in *Williams* our court was concerned with the 1952 midair explosion of a B-47 jet bomber. We declined to apply res ipsa on the basis that the court had no knowledge, judicial or otherwise, of what would cause a jet plane to explode in midair flight. *Williams* recognized, however, that each case seeking to invoke res ipsa must stand or fall upon its own facts; that a situation in which the doctrine was previously inapplicable because of insufficient experience or lack of technical knowledge may currently fall within the scope of the rule; and that experience concerning the particular situation may be so uniform and well established that it is not necessary that it be "proved" by extraneous evidence.

Many of the cases concern common carriers. Mobil is not a common carrier, but its use of a fleet of helicopters as substitutes for crew boats, regularly moving men and equipment from shore to offshore drilling sites and back again, makes it someting very close to a common carrier insofar as analysis of res ipsa is concerned. The ensuing regularity of operation with few significant incidents represents the kind of change in technology which *Williams* refers to, and it is a change which need not be adduced by specific proof but which judges in their experience may recognize. Judge Holtzoff discussed the change in technology concept in *Smith v. Pennsylvania Central*, 76 F.Supp. 940 (D.D.C. 1948). He pointed out that the argument that airplane accidents may be due to mysterious and unknown causes might have been applied to the railroads in their infancy, but that res ipsa was applied to them as early as 1844.

I dissent from the holding, in part V, that it was error for the trial court to calculate Higginbotham's future earnings by using 5% annual straight line estimated salary in-

creases. *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (CA5, 1975), was bad enough. Now it is extended. Here, the trial court's result was not based on an economist's projection of future economic cycles but upon circumstantial evidence consisting of past wage increases (those of Higginbotham and of the successor in his job) from which one may infer that the pattern of a sufficiently long period in the past is more likely than not to be the pattern of the future. A court should be entitled to conclude that a past pattern of earnings increases is of sufficient duration and uniformity that it is a reliable basis for an inference with respect to the future, even though the increases embraced in that pattern may contain cost of living increments It seems to me that this is what the trial judge did in accepting the past track record and in holding that he was not taking into consideration decreased purchasing power of the dollar. I would, therefore, affirm on this issue.

In innumerable other contexts we accept the events of the past as the basis for an inference as to what the future will hold. Indeed we often insist upon it as the necessary predicate for an opinion respecting the future. Thus, if the plaintiff's back has hurt for two years since the accident, the doctor is allowed to opine that it will continue to hurt, and we never pause to doubt that this is permissible. We accept, indeed insist upon, projecting life expectancy upon the past record with respect to millions of people, although plaintiff may be (and almost certainly will be) an exception to the projected figure. The examples are endless. Yet we would not permit consideration of evidence that a particular plaintiff had received a $200 per year increase in pay every year for 20 years, unless he could divide it up into "productivity" pay and "economic change pay". In this single area of projecting future earnings we deny ourselves

the best evidence available on the asserted ground that it is not sufficiently reliable, and, in the name of reliability we mandate the artificial conclusion that one will earn the rest of his life what he is earning on the day he is killed or injured. The only thing certain about this is that it is certain to be wrong.

GEE, Circuit Judge concurring in part and dissenting in part:

I fully concur in Parts I and II of Judge Thornberry's thorough and well-reasoned opinion. I am unable to concur, however, in the application of the doctrine of res ipsa loquitur made in Part III, and hence would not reach the matters discussed thereafter. In this circuit, the doctrine of res ipsa loquitur applies in an airplane crash case only if a preponderance of the evidence shows that the *particular accident in question* would ordinarily not have occurred in the absence of defendant's negligence.[1] But the opinion would approve application of the doctrine here by overruling longstanding Fifth Circuit law on the ground that airplane crashes no longer "ordinarily occur" without negligence. *Supra* at slip opinion p. 753,____F.2d at p.___. If

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1. *Compare Morrison v. LeTourneau Co.*, 138 F.2d 339, 341 (5th Cir. 1943) ("The doctrine . . . cannot apply in cases of this sort, because *there is no showing* that accidents of this very nature cannot happen [without negligence]." (emphasis added), with *Williams v. United States*, 218 F.2d 473, 476 (5th Cir. 1955) (per curiam) ("[E]ach case seeking to invoke this doctrine must stand or fall upon its own facts."), and *United States v. Johnson*, 288 F.2d 40, 45 (5th Cir. 1961) ("[P]laintiffs had produced enough evidence to show that [ordinarily] these accidents would not have occurred if [defendants had been diligent.]").

Part III of the opinion really intends this, and if the pronouncement be taken at face value, a sudden and massive shift in our circuit's airplane-crash liability law would occur. Henceforth, as examples, when an aircraft in apparently good working condition vanishes during an over-water flight, or a fishing boat disappears in calm weather without radio transmission or siginificant wreckage, its operator will be liable.

The opinion of the court below attempts no factfindings about whether at the present time airplane accidents in genearal ordinarily occur without negligence; moreover, the record contains nothing approaching the comprehensive evidence of a general nature sufficient to support such a conclusion. If the trial court had meant to make such findings on the basis of the discrete evidence in this particular case, they would rest on an evidentiary basis no sounder--and be no more appropriate--than a finding that all red-headed men are bank robbers derived from evidence that John Smith, a red-headed man, robbed a bank. And if we are finding such facts on disputed evidence, as we should not be, our finding is precisely as groundless when based, as it is, on the same record. If on the other hand, we are announcing law, we are equally wrong to do so and for at least two reasons.

First, as a matter of common sense, it is plain that not all mistakes in judgment are negligent ones. General experience teaches that Hobson's choices arise in all activities subject to the elements, so that the pilot of a properly-functioning aircraft may take the path that leads to death or injury for himself and his passengers without carelessness. As Judge Tuttle once warned:

> It is not true that [an airplane] crashes only if the pilot is *negligent*. Such crashes may be attributable to many things, such as structural defects, conditions of weather, excusable error in pilot judgment falling far short of pilot *negligence*, and the like.

United States v. Johnson, 288 F.2d 40, 46-47 (5th Cir. 1961) (dissenting opinion) (emphasis in original).

Second, on the procedural side, nothing is more firmly established in this circuit than the principle that decisions by a panel of our court are to be overturned only by the Supreme Court or by the court sitting en banc, not by a later panel. Under *LeTourneau*, as Judge Thornberry's opinion avows (Part III, preamble), res ipsa is not presumptively or generally applicable in our circuit to accidents of this nature. And if the conditions of air travel have so improved in the time since *LeTourneau* as to make it so applicable, it is the en banc court that must say so.

Doubtless the res ipsa doctrine will apply in a proper case where specific findings ruling out non-negligent causes can be and have been made on sufficient evidence. This is no such case. As noted, no evidence supports even a general finding that this particular accident would not ordinarily have occurred without negligence. To be sure, the trial judge ostensibly made such a finding, *Higginbotham v. Mobil Oil Corp.*, 357 F.Supp. 1164, 1174 (W.D. La. 1973), but he also found the evidence so insufficient that no probable cause of the accident could be determined. *Id.* at 1172. And four pages of discussion were necessary for him to dispose, in the face of highly conflicting expert testimony, of the structural failure theory, which was rejected at least in part because "very little (absolutely none

of the main power and control units or instrument panel, no flight plan, no communication, no performance record, taped or otherwise) of the aircraft remained and was available for analysis." *Id.* at 1167-68. In other words, there was not enough left of the craft to form a reliable basis for ruling in *or out* structural failure as a cause of the crash. In short, countless possibilities could explain the tragedy in this case, and to allow an inference of fault here is to tolerate blind speculation.

Even if res ipsa were appropriate, the lower court applied the wrong standard of proof. As the majority opinion points out, an inference that a defendant was negligent is permitted only when the likelihood of *all* other possible causes is sufficiently low that the factfinder reasonably concludes from a preponderance of the evidence that defendant *must* have been negligent. Here the finder of fact applied res ipsa after finding only that the evidence as a whole "afford[ed] a reasonable inference of fault." 357 F.Supp. at 1174. The factfinder may reasonably discern several possible explanations, but only a single most probable one.

Thus, the lower court adopted the wrong standard in applying an inappropriate doctrine. I would reverse on the res ipsa loquitur issue. Since this is not to be, however, I concur in Judge Thornberry's disposition of the damages questions discussed in Part V of the majority opinion.

Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1977

NO. 76-1722

MRS. FRANCIS NELL HIGGINBOTHAM
Administratrix, etc. of Marshall K. Higginbotham, Deceased, etc., et al.,
Petitioners

versus

MOBIL OIL CORPORATION, ET AL.,
Respondents

Response on behalf of Mobil Oil Corporation to the Petition for Writ of Certiorari of Francis Nell Higginbotham, et al.

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Response on behalf of Mobil Oil Corporation to the Petition for Writ of Certiorari of Francis Nell Higginbotham, et al.

Respondent Mobil under Docket No. 76-1726 also seeks review of the judgment of the U.S. court of Appeals for the Fifth Circuit. Mobil submits that the Court of Appeals correctly disallowed a 5% straight line salary increase in a computation of damage due to loss of future earnings. But it does not deny that there is conflict between *Bach v. Penn Central Transportation*[1] in the Sixth Circuit and the decisions of other circuit courts[2] as to whether a determination of damages due to the loss of future earnings should include an allowance for inflation or deflations under federal law.

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1. *Bach v. Penn Central Transportation Co.*, 502 F.2d 1117 (6 Cir. 1974).

2. *McWeeney v. New York, N.H. & H.RR.* 282 F.2d 34 (2 Cir. 1960) en banc, cert. denied 364 U.S. 870, 81 S.Ct. 115.
Yodice v. Koninklijke Nederlandsche Stoom. Maat, 443 F.2d 76 (2 Cir. 1971).

THE FIFTH CIRCUIT'S DECISION EXCLUDING THE EFFECT OF POSSIBLE FUTURE INFLATION AND REQUIRING REDUCTION TO PRESENT VALUE IS CORRECT

Historically the United States Courts have not allowed the trier of fact to consider possible future increases or decreases in the purchasing power of money or to hear expert evidence as to inflation.[3] This court's decision in *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 36 S.Ct. 630, 60 L.ED. 1117 (1916), an F.E.L.A. case, held that the present cash value of future earnings is the proper measure of recovery. Specifically it was held that lump sum awards of future damages must be discounted to present value to allow for future interest on the award. The Court said it was "self evident" that a "sum of money in hand is worth more than the like sum . . . .payable in the future" 241 U.S. at 490-91.

Johnson v. Penrod Drilling Co., 510 F.2d 234 (5 Cir. 1975) cert. denied 96 S.Ct. 68.

Matter of S/S Helena, 529 F.2d 744 (5 Cir. 1976)

Canal Barge Co. v. Griffith, 513 F.2d 911 (5 Cir. 1975)

Sandefer v. U.S., 511 F.2d 101 (5 Cir. 1975)

Robertson v. Douglas Steamship Co., 510 F.2d 827 (5 Cir. 1975)

Law v. Sea Drilling Co., 510 F.2d 242 (5 Cir. 1975)

Sleeman v. Chesapeake & Ohio Ry. Co., 414 F.2d 305 (6 Cir. 1960)

Petition of U.S. Steel Corp., 436 F.2d 1256 (6 Cir. 1970) cert. denied 402 U.S. 947, 91 S.Ct. 1649; cert. denied 402 U.S. 987, 91 S.Ct. 1660; cert. denied 402 U.S. 987, 91 S.Ct. 1665; reh. denied, 403 U.S. 924, 91 S.Ct. 2227 reh. denied 403 U.S. 940, 91 S.Ct. 2247.

3. *McWeeney v. New York N.H. & H.R.R. Co.*, supra, note 2. at p. 38 Judge Friendly wrote "Though some courts have sanctioned instructions permitting the jury to take into account inflation between the injury and the trial, there is little or no authority in favor of charging the jury to take future inflation into account, see 2 Harper and James, The Law of Torts, § 25, 11 (1956)."

The *Kelly* case has been viewed as both requiring reduction to present value and prohibiting the consideration of inflation.[4]

In the instant case the Fifth Circuit recognized that the petitioner is entitled to prove loss of future earnings other than increases due to anticipated increase in cost of living, inflation, or decrease in the purchasing power of the dollar. (A- 53, 54). But in accord with *Johnson v. Penrod Drilling Co.*, 469 F.2d 897, 510 F2d. 234 (5th Cir. 1975) rehearing en banc, cert. denied 96 S.Ct. 68, the court instructed that no recovery could be granted for wage increases that were as "an automatic hedge against inflation."

In *Penrod*, a Jones Act case, the Fifth Circuit followed the traditional position of the Federal Courts in assessing damages due to loss of future income. That is, it instructed that there should be no increase of computed gross earnings by the amount of estimated wage increase due to inflation.

The principal reason for not considering the effects of economic trends on damage recoveries is that such trends are inherently unpredictable, the trend itself is unpredictable and its impact on future wages is too speculative. Moreover, a plaintiff who invests a lump sum award will gain a hedge against the effect of inflation.

The courts have considered both the computation of income tax on future earnings and the forecasting of future inflation as speculative and in as much as they tended to off set each other, have disallowed both.[5]

4. *Sleeman v. Chesapeake & Ohio Ry. Co.*, supra note 2.
Petition of U.S. Steel Corp., supra note 2.

5. *Penrod* supra note 2
McWeeney supra note 2

It has been said that "economists have faired only slightly better than fortune tellers and soothsayers in forecasting the future."[6] It is no wonder, when we consider the various factors that influence inflation; rate of unemployment, government monetary and fiscal policies, war and peace, taxes, and politics.

If inquiry is limited to cases decided under federal law, *Bach v. Penn Central Ry. Co.*, not *Penrod* or *Higginbotham*, is out of harmony with the decided cases. Even in *Bach* the court rejected evidence of an economist's projection of inflation to the year 2002 and held that such evidence was too speculative. The *Bach* court however did say that the jury should be allowed to consider future economic trends *sua sponte* and hence the trial judges instruction that the jury was not to consider "future increases and decreases in the purchasing power of money."[7] was in error.

THE COURT SHOULD GRANT CERTIORARI AND REVIEW IN ADDITION TO THE ISSUES RAISED IN MOBIL PETITION THOSE RELATED TO CONSIDERATION OF INFLATION ON THE COMPUTATION OF LOSS OF FUTURE WAGES

Although the decision below is in the main stream of the circuit court cases decided under federal law considering how future inflation or deflation should be treated in arriving at lump sum awards there is confusion, if not conflict and chaos among the opinions of the circuits when all federal appellate decisions in point are considered. A decision by this court could resolve the questions relating to infla-

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6. *Johnson v. Serra*, 521 F.2d 1289 (8 Cir. 1975)

7. 502 F.2d 1117 at 1122

tion and bring predictability and uniformity to this area of the law.

There are at least four approaches that federal courts of appeal have used in determining the effect of inflation on future damages. We identify them here as, the Historical or Traditional, the Jury's Common Sense, the Expert Witness or Evidentiary Approach, and the Beaulieu, Inflation-Discount Offset.

HISTORICAL OR TRADITIONAL APPROACH

Under the historical or traditional approach no effort is made to foresee future monetary trends, because to do so would involve a degree of speculation considered unwise, that the ability to invest a lump sum award will offset any inflationary effect. Supporting the historical approach is also the belief as expressed by Judge Friendly in his concurring dubitante opinion in *Feldman v. Allegheny Airlines, Inc.* 524 F.2d 384 (2 Cir. 1975) at 392:

> "I doubt whether judges, or anyone else can peer so far into the future; the district court's computations suffer from what Mr. Justice Holmes, in another context called "[t]he dangers of a delusive exactness," *Trunex v. Corrigan*, 257 U.S. 312, 342, 42 S.Ct. 124, 133 66 L.Ed. 254 (1921) dissenting opinion."

First Circuit

In a death claim under the Federal Tort Claims Act, the First Circuit Court of Appeals, in *Williams v. United States*, 435 F.2d 804 (1 Cir. 1970) opinion by Chief Judge Aldrich, rejected plaintiff's argument that the anticipated future earnings be increased by hypothesized future inflation:

"(5) Nor, finally can we accept plaintiff's argument that the anticipated future earnings are to be increased by some multiple taken out of the air in the name of future inflation. While plaintiff submitted a number of cases making reference to inflation, most of them are simply rejections of comparisons with past verdicts, on the ground that subsequent, already demonstrated, inflation has made the comparison inapposite. None clearly accept the use of predictions as to future inflation. While we have found a case which may be read as speaking in terms of future inflation, *Southern Pac. Co. v. Zehnle*, 9 Cir. 1947, 143 F.2d 453, and one which must be so regarded, *Brooks v. United States*, D.S.C. 1967, 273 F.Supp. 619, both rely exclusively on cases involving inflation already established. Particularly in considering predictions of an accumulated estate, which, if there is inflation, must be adjusted for possibly inflated expenses as well as earnings, we consider such speculation inadmissible." (p. 807)

In the *Williams* case the court was called upon to apply Rhode Island law. Since there was no precedent under Rhode Island law, the court filled the void. Subsequently Rhode Island by amendment to its wrongful death act, now permits evidence of future economic trends.[8]

8. 1971 R.I. Pub. Laws ch. 46 sec 1 (codified at R.I. Gen. Laws sec. 10-7-11 (1975).

Second Circuit

In *McWeeney v. New York, N.H. & H.R.R.*, a Federal Employers' Liability Act claim, opinion by Circuit Judge Friendly, the Second Circuit Court of Appeals considered whether income tax must be deducted in awards for past and future lost wages. The Court refused to lay down a fast rule, discussing the administrative problems in proof, uncertainty and countervailing factors, including inflation. Judge Friendly stated:

"Though some courts have sanctioned instructions permitting the jury to take into account inflation between the injury and the trial, there is little or no authority in favor of charging the jury to take future inflation into account, see Z. Harper & James, *The Law of Torts*, Sec. 25.11 (1956)."(p. 38)

Chief Judge Lumbard dissented suggesting that nothing can be more certain than that there will be a federal income tax in the years to come, substantially what it is now and what it has been for many years. In disposing of Judge Friendly's countervailing argument anent inflation, Chief Judge Lumbard observed:

"As to inflation, what tomorrow's values will do with today's dollar can hardly be argued to be more harmful to plaintiffs than to defendants. We can only deal in today's dollar. *On any other basis any trial would soon be out of*

hand with only the sky as the limit. Defendants too must live with inflation, be they railroads or individuals; indeed railroads seem to have even more difficulty with inflation than do individuals. A *plaintiff receiving a large amount will invest the money in all likelihood in such a manner that he will have some protection against both inflation and deflation.*" (pp. 42-43, emphasis supplied).

In *Yodice v. Koninklijke Nederlandsche Stoom. Maat,*[10] opinion again by Judge Friendly eleven years after *McWeeney,* the district judge had refused to instruct the jury to discount future loss of earnings to present value because they would then have to consider such other things as inflation. The Second Circuit Court of Appeals reversed. It stated:

> "While if inflation should continue at its present pace, courts may have to reconsider the propriety of the long recognized charge with respect to discount, cf. *McWeeney v. New York, N.H. & H.R.R.*, 282 F.2d 34, 38 (2 Cir.), cert. denied 364 U.S. 870, 81 S.Ct. 115, 5 L.Ed. 2d 93 (1960), *they have elected not yet to do so, Sleeman v. Chesapeake & Ohio Ry.*, 414 F.2d 305,307-308 (6 Cir. 1969)." (p. 79)

Third Circuit

The Third Circuit cases considering the effect of future inflation have all been based on diversity jurisdiction and

10. *Yodice* supra note 2.

under Pennsylvania law. But since state law did not speak to the point, the Third Circuit decisions indicate the position that circuit would take should the issue arise under federal law.

Magill v. Westinghouse Electric Corp.[11] involved the death of a painting contractor employee. The trial judge had permitted an actuary to testify regarding an earning increase factor of 3-1/2 percent extrapolated into the future. Westinghouse objected to its admissibility as violating reduction to present value and permitting the jury to speculate unnecessarily concerning inflation. The Third Circuit reversed on the narrow basis that the actuary was not an economist and no evidence was offered to show that 3-1/2 percent was determined by other than mere guess or speculation. To harbor judicial time, the Court stated on retrial that the administrator could introduce evidence of certain promotions or pay raises in the future to argue an increase factor. It concluded its discussion with a precautionary notation:

> "Because there may be a substantial factual basis for use of an earnings increase factor, we do not foreclose the administrator from attempting, at the new trial, to establish that foundation and receiving a charge similar to that given at the original trial. We note, however, that the concepts of inflation and the declining value of the dollar have been almost universally rejected as providing support for the earnings increase factor. See *Sleeman v. C & O R. Co.*, 414 F.2d 305, 308 (6th Cir. 1969); *McWeeney v. N.Y.N.H. & H.R.R. Co.*, 282 F.2d 34, 38 (2d Cir. 1960)." (p. 301)

11. *Magill v. Westinghouse Electric Corp.*, 464 F.2d 294 (3 Cir. 1972)

What was only a precautionary instruction in the *Magill* decision became the law of the Third Circuit in *Frankel v. Heym.* [12] Circuit Judge Hastie, writing for the Court, held that the district court correctly reduced the future cost of institutional care to present worth and rejected a substantial allowance for inflation. The Court stated that it specifically agreed with the district court's analysis and conclusion at 321 F.Supp. 1331, 1345-1348. Chief Judge Sheridan, writing for the district court, reviewed authorities and concluded:

> "The projected inflationary trend is speculation. Plaintiff has used the decade of the 1960s, one of the more inflationary times in the history of our country, as the basis for a projection of over fifty years. It is common knowledge that our Government is and has been attempting to control inflation, even to the point of considering wage and price controls. *Economists differ on their predictions. Moreover, plaintiff will have money that can be invested and if inflation continues, the return on the money will be greater, and this would have an offsetting effect.* Increased costs for institutional care will not be considered." (p. 1346, emphasis supplied)

Fifth Circuit

In *Johnson v. Penrod Drilling Co.,* [13] the Fifth Circuit sitting en banc adopted the traditional approach saying:

12. *Frankel v. Heym,* 321 F.Supp. 1331, 466 F.2d 1226 (3 Cir. 1972)

13. Supra note 2.

> "Although we today reverse the judgments entered below on the jury trial question discussed supra, we expressly disapprove the district court's attempt to take into account, in computing the plaintiffs' future lost earnings inflationary trends in this nation's economy for the next several decades. As the Sixth Circuit concluded in its Sleeman decision we hold that the influence on future damages of possible inflation or deflation is too speculative a matter for judicial determination. Should either or both of these cases be retried before a jury, the triers of facts should not be instructed to take into account future inflationary or deflationary trends in computing future lost earnings, nor should the jury be advised to consider such alternative descriptions of inflationary and deflationary trends as the purchasing power of the dollar or the consumer price index."

At page 236 the court stated:

> "We judicially notice that inflationary conditions in this nation's economy have worsened in the interim between the November 21, 1972 panel opinion and today and we recognize that this accelerating rate of inflation increases the likelihood that inflation could become a predictable condition for the future. Nevertheless, with this added light, we still cannot so surely discern the shadow of inflation as a coming event as to warrant requiring its inclusion in a present rule for calculating future damages. The worsening of in-

> flation might as readily foretell a recession or a depression as its continuity. Strong governmental counter measures have been proposed and their efficacy is still unknown. Then too, if future inflation does cause higher wages, experience predictably demonstrates that higher interest rates on investments which have always accompanied inflation will also occur and this factor will mitigate the failure to include an inflationary surcharge in wage rate calculations."

All subsequent cases in the Fifth Circuit adhered to the *Penrod* decision.[13a] However in two cases decided in conformity with *Penrod, Lacager v. Olendorff,* 526 F.2d 1213 (5 Cir. 1976) and *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300 (5 Cir. 1976) the court on its own motion granted en banc hearings. Both cases were settled before the rehearings took place, but Judge Wisdom's specially concurring opinion in the Freeport case which will be discussed later in this brief may give some inkling as to why the court wanted to reconsider the *Penrod* position.

Sixth Circuit

Sleeman v. Chesapeake & Ohio Ry.[14] is the first and the leading case in the Sixth Circuit. In both *Sleeman* and *Petition of U.S. Steel Corp.*[15] the present worth formula of *Chesapeake & Ohio Ry. v. Kelly* is construed to prohibit inflationary consideration since it requires the present value of money to be the proper basis of damages.

13a. See *Matter of S/S Helena, Canal Barge Co. v. Griffith, Sandifer v. U.S., Robertson v. Douglas Steamship Co.,* and *Law v. Sea Drilling Co.,* supra note 2.

14. Supra note 2

15. Supra note 2

In the *Sleeman* decision, a Federal Employers' Liability Act case, the Court said:

> "Nor do we encourage the trial courts of our circuit to explore such speculative influence on future damages as inflation and deflation. Of course, the nation's economic history since the 1930s would appear to make the use of present wages as the standard for loss of future earnings somewhat unfair to plaintiffs. But as to the future, the inflation versus deflation debate rages inconclusively at the highest policy levels of our government, in national electoral campaigns, in learned economic journals and is exemplified in the daily gyrations of the stock markets. The debate seems unlikely to be resolved satisfactorily in one personal injury trial. And if testimonial resolution of this factor bearing on the future is attempted, the door is opened to similarly speculative and debatable offsets tending in other directions. See *McWeeney v. N.Y., N.H. & H.R.R.*, 282 F.2d 34 (2d Cir. 1960)." (p. 308)

The Sixth Circuit affirmed its position in *Petition of U.S. Steel,* involving claims arising under general maritime law:

> "It was well settled that an award for future damages must be reduced to present value in order to take into account the earning power of that money. *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 491, 36 S.Ct. 630, 60 L.

> Ed. 1117 (1916). It is equally well settled in this Circuit that the prospect of a future decline in the purchasing power of the dollar may not be used to offset the reduction to present value. *Sleeman v. Chesapeake & Ohio Ry.*, 414 F.2d 305 (6th Cir. 1969)." (p. 1280)

The Sixth Circuit's decision in *Bach v. Penn Central Transportation Co.* is discussed in the section The Jury's Common Sense.

Ninth Circuit

In *Furmizo v. United States,*[16] a Federal Tort Claim Act case applying Hawaiian law, the Ninth Circuit approved the district judge's disallowance of an inflation adjustment on the ground that such an award was "unduly speculative." But the Ninth Circuit would seem to favor an evidentiary or expert witness approach if it were to adopt a rule for itself.[17]

THE JURY'S COMMON SENSE

Sixth Circuit

In *Bach v. Penn Central* the Sixth Circuit expressed doubt that economist could predict inflationary trends for the next thirty years holding that such evidence was too speculative to be admissable. The court however said that the jury should be permitted to consider future economic trends *sua sponte* saying:

16. 245 F.Supp. 981 (D Hawaii 1965) aff'd 381 F.2d 965 (9 Cir.1967)

17. *United States v. English*, 521 F. 2d 63 (9 Cir. 1975)

> "Inflation is. . . within the common experience of all jurors. Admittedly,. . . .with_ut expert testimony, their calculations will be even more imprecise. . . .But if jurors should be prohibited from applying their common knowledge of inflation in reaching a verdict, the party entitled to recover could be grievously under compensated." p. 1122.

Eighth Circuit

The Eighth Circuit has followed the *Bach* approach in *Riha v. Jasper Blackhorn Corp.*[18] and in *Johnson v. Serra.* [19] Both cases were decided under state law and in both the jury was allowed to consider inflation as a "general factor" but because of the speculative nature of inflation and the possibility of unmanageable trials the court refused to allow direct testimony on the issue.

THE EXPERT WITNESS OR EVIDENTIARY APPROACH

Second Circuit

Feldman v. Allegheny Airlines, Inc.[20] is a diversity case decided under Connecticut law. Connecticut reduces judgments for wrongful death by requiring deduction of income taxes payable on future earnings. The trial judge allowed a 1 1/2% discount rate in calculating the present value of the decedent's lost future earning capacity. The appellee pro-

18. *Riha v. Jasper Blackburn Corp.*, 516 F.2d 840 (8th Cir. 1975).

19; Supra note 6.

20. *Feldman v. Allegheny Airlines, Inc.*, 524 F.2d 384 (2 Cir. 1975)

duced expert testimony that an average earnings of 4.14% (from mutual savings bank investments) as representative of a prudent, non-sophisticated investment and subtracted 2.87% as the average yearly inflation rate revealed in the Department of Labor's Consumer Price Index over an 18 year period.

Concerning the manner in which the trial court handled the inflation issue, the court of appeals said:

> "The district court was fully aware that in a way it was being speculative in what it was doing, as every trier of fact is required to some extent to be whenever it engages in calculating future earnings and a lump sum discount rate. 382 F. Supp. at 1291-92. As a matter of federal law we do not necessarily vouchsafe either the principle of making an "inflation adjustment" in setting a discount rate or the means by which it was done in this instance. Yet we note that consideration of inflation has historically been approved in a number of state courts. See, e.g., *Halloran v. New England Telephone & Telegraph Co.* 95 Vt. 273, 276, 114 A. 143, 144 (1921) and cases cited in Judge Blumenfeld's opinion, 382 F.Supp. at 1290. As a matter of federal law, at least one circuit has approved jury consideration of the impact of inflation and even reversed for charging that it should not consider "future increases or decreases in the purchasing power of money." *Bach v. Penn Central Transportation Co.*, 502 F.2d 1117, 1122 (6th Cir. 1974); see also *Sleeman v. Chesapeake & Ohio Railway Co.*, 414 F.2d 305 (6th Cir. 1969)."

Ninth Circuit

Since its decision in *Furumizo* the Ninth Circuit appears to have favored the taking of evidence and determining future inflation or deflation as a fact. See *Mills v. Tucker*, 499 F.2d 866 (9 Cir. 1974).

In *United States v. English*[20a] a Federal Tort Claims Act case decided under California law, the Ninth Circuit held that expert testimony was mandatory when a jury considered future economic trends. Although *English* was decided under California law which permits expert economic evidence as to future inflation the court said "We would also feel impelled to the same result for policy considerations."[21]

Rejecting the considerations that underly the historical approach the Ninth Circuit said:

> "While predicting future inflationary trends, or extrapolating from present ones, may be speculative, so are most predictions courts make about future incomes, expenses (as, for example, in the case of wrongful death of an infant). Since it is still more probable that there will in the future be changes in the purchasing power of the dollar, it is better to try as best we can to predict them rather than ignore them altogether."

Burlington Northern Inc. v. Boxherger,[22] was decided under the Federal Employer's Liability Act. It is consistent

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20a. Supra note 17.

21. 521 F.2d at p. 75.

22. *Burlington Northern Inc. v. Boxherger*, 529 F.2d 284 (9 Cir. 1975).

with *English* in that it approxed the taking of expert testimony from an economist as to loss of future earnings.

Tenth Circuit

The trial court's failure to give effect to the influence of inflation on the plaintiff's earnings was the important point considered by the Tenth Circuit in *Steckler v. United States.*[23] A medical malpractice case under the Federal Tort Claims Act the court paid no particular attention to Colorado law, the place where the cause of action arose. A C.P.A. gave expert testimony that a factor of 9.5% per annum was appropriate to compute inflation caused future wage increases. The district court adopted the historical approach, but noted the division of judicial authority on the subject and that neither the United States Supreme Court nor the Tenth Circuit had spoken definitively on the subject. The Tenth Circuit in an opinion by Judge Doyle considering itself free to select what it considered the most appropriate way to treat the effect of inflation on loss of future earnings. After a general review of the jurisprudence in which it considered the four approaches discussed in this brief the court concluded:

> "[2] In our opinion the best rationale is contained in the opinion of Senior Circuit Judge Barnes in the Ninth Circuit case of *United States v. English*, wherein the court objected to the offset approach of the Alaskan rule, but approved the trier of fact taking into account estimated changes in the purchasing power of money, and at the same time discounting the future income

23. *Steckler v. United States*, 549 F.2d 1372 (10 Cir. 1977).

> stream to its present value. The worth of this approach is found in its coming to careful grips with the inflation trends and with the problem of discounting the ultimate inflated sum (to be supported by reliable evidence) so as to reduce it to its present value.
>
> [3] On remand the court should then determine from the evidence a reasonable annual percentage figure for the purpose of accounting for probable wage inflation during the 26 year work expectancy of Steckler."

THE BEAULIEU, INFLATION-DISCOUNT OFFSET

In 1967 the Supreme Court of Alaska decided an automobile accident case, *Beaulieu v. Elliott*[24] in which one element of damage was future wage loss. The court solved the problem by substantive rule of law rather than as a problem of proof. After stating that it has become the generally accepted rule that damages awarded for future loss of earnings should be reduced to present worth, the court without citation of any authority, went on to announce its own rule for dealing with inflation. The pertinent part of the opinion reads:

> "But we believe that the rule for reducing awards,. . .ignores facts which should not be ignored. Annual inflation at a varying rate is and has been with us for many years. There is no reason to expect that it will not be with us for many years. There is no reason to expect that it

24. *Beaulieu v. Elliot*, 434 P. 2d 665 (Alas. 67)

will not be with us in the future. This rate of depreciation offsets the interest that could be earned on government bonds and many other 'safe' investments. As a result the plaintiff, who through no fault of his own is given his future earnings reduced to present value must, in order to realize his full earnings and not be penalized by reduction of future earnings to present value, invest his money in enterprises, other than those which are considered 'safe' investments, which promise a return in interest or dividends greater than the offsetting rate of annual inflation. But ours is a competitive economy. By their very nature some enterprises backed by investors' money are going to fail with resulting loss to individuals. Thus, instead of being assured of earnings at rates greater than the annual rate of inflation, the injured plaintiff stands a chance of entirely losing his future earnings by unlucky or unwise investments. Since the plaintiff, through the defendant's fault and not his own, has been placed in the position of having no assurance that his award of future earnings, reduced to present value, can be utilized so that he will ultimately realize his full earnings, we believe that justice will best be served by permitting the trier of fact to compute loss of future earnings without reduction to present value. The plaintiff is more likely to be restored to his original condition under the rule we adopt than under the prevailing rule which calls for a discounting of the award for future earnings."

Judge Wisdom's specially concurring opinion in *Freeport Sulphur Co. v. S/S Hermosa*[25] urges the *Beaulieu* rule as the "logical successor to our argument" in *Johnson v. Penrod Drilling Co.* . . . that

> "if future inflation does cause higher wages, experience predictably demonstrates that higher interest rates on investments which have always accompanied inflation will also occur and this factor will mitigate the failure to include an inflationary surcharge in wage rate calculations." p. 309.

Judge Wisdom discusses economic theory as to the relationship between inflation and interest, he comes to the conclusion that "prospective interest seems to me to be as speculative as future inflation", note 11, and urges the adoption of the *Beaulieu* offset saying:

> "Moreover, my proposed adoption of the Alaska rule would go a long way toward fulfilling the policies enunciated in *Penrod*. We attempted in that opinion to achieve accurate compensation, while preventing the use by district courts of speculative factors such as future inflation, 510 F.2d at 236, 241, and attaining simplified and efficient trial procedures. 510 F.2d at 237. By prohibiting speculation about future interest rates, by relieving district judges of the responsibility to make present value calculations, and by providing more complete compensation than the consider-present value-ignore-inflation rule, the offset approach would effectively promote these *Penrod* policies."

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25. *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300 (5 Cir.1976)

CONCLUSION

Respondent Mobil Oil Corp. submits that the Fifth Circuit opinion with regard to the effect of inflation on computation of future wage loss was correct. Respondent submits however that certiorari should be granted here as well as under Dkt. 76-726 to clarify the important questions presented and to resolve the conflict between the courts of appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for petitioner has caused three copies of the foregoing response to Petition for Writ of Certiorari to be served on jack Benjamin, 1718 NBC Building, New Orleans, La. 70112; Jack Caldwell, 519 Main Street, P.O. Box 592, Franklin, La., 70538; Messrs. Christovich & Kearney, American Bank Building, New Orleans, La., 70130; Messrs. Thompson & Sellers, P.O. Box 308, 112 South Louisiana Ave., Abbeville, La., 70510 and I.P. Saai, Jr., P.O. Box 176, Gueydan, Louisiana, by placing in the U.S. Mails, first class postage prepaid, this the 8th day of September, 1977.

CARL J. SCHUMACHER, JR.